Public Utilities

FORTNIGHTLY

Volume LII No. 8 October 8, 1953

JUSTICE FOR UTILITY HOLDING COMPANY EQUITIES

By Frank D. Chutter

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An Unregulated "Utility"

By A. Bryan Marvin

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Selecting and Training Utility Salesmen

By Philip M. Alden and Albert G. Garrigues

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Addresses on Public Utility Problems—Public Utility Law Section—American Bar Association—Appendix. Part I.

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Public Utilities Fortnightly.. stands for Federal and state regulation of both privately owned and operated utilities and publicly owned and operated utilities, on a fair and nondiscriminatory basis; for nondiscriminatory administration of laws; for equitable and nondiscriminatory taxation; and, in general—for the perpetuation of the free enterprise system. It is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.

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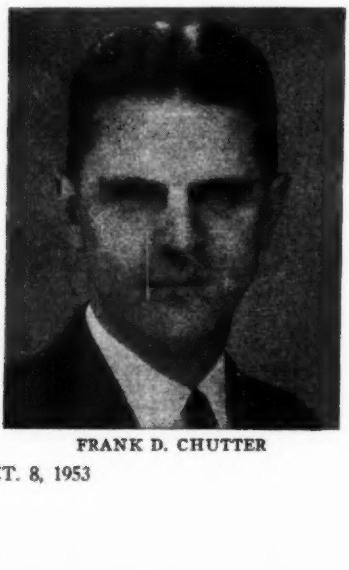
ONE strange but persistent misconception about the rôle of a public utility company as a taxpayer is often encountered in both regulatory and tax proceedings. Stated in an oversimplified way, it amounts to a superficial argument that the utilities should not complain about taxes because the customers have to pay them, through their rates, in any event. It is a naïve assumption that the utility company, as such, is more of a tax collector than a taxpayer.

IN a general way this specious argument could be more suitably applied to almost any other business enterprise. Whether it be the tax on shoes, ships, or sealing wax, the unregulated business manager must include higher taxes as part of the price his customer pays for the end product.

BUT whereas the shoe store manager simply has to put a higher price ticket in the window, the utility company manager is required by law to keep on charging a fixed rate, regardless of the fluctuation of operating expenses, including taxes, until otherwise authorized by regulatory authority. And this, we know, involves



FRANK D. CHUTTER

PHILIP M. ALDEN

expensive and time-consuming processes of months and even years, if extended court litigation develops. Quite a different thing from switching price tickets in the display window!

ASIDE from the relatively inflexible restriction on utility rate changes, more equitable considerations are involved, as between the customer (or the ratepayer) and the owner of the business (or investor). Federal income taxes, paid by public utility holding companies, come out of the pockets of their investors rather than being paid by the customers.

BECAUSE of the Securities and Exchange Commission regulations promulgated in 1941, regarding consolidated income tax returns, holding companies earned comparatively less for their stockholders than corresponding operations by the independent operating companies. Unless something is done to eliminate this inequity, a gradual shifting from holding company to operating company common stocks is likely to take place.

THE opening article in this issue is

written by FRANK D. CHUTTER, utility specialist for the Massachusetts Investors Trust of Boston. He has analyzed the reasons for early consideration by the SEC of proposed changes. MR. CHUTTER received his MBA degree from the Harvard Business School in 1927 following graduation from Yale University in 1925. He acquired a well-rounded background during the next fifteen years in the investment banking, banking, and Federal regulatory fields before joining his present organization in 1943.

* * * *

IF office building elevator operators charged passengers for their service, it could easily become the most widely patronized public utility industry in the nation. But because there is no charge or rate, it has not been subjected to regulation, except that of safety and maintenance inspection. Just the same, elevator service, generally in skyscraping cities such as New York, has come to represent a considerable load for the electric utilities.

BEGINNING on page 480, A. BRYAN MARVIN, of the press relations and public information department of Consolidated Edison Company of New York, Inc., gives us an interesting description of this transit system with 100,000 vehicles carrying more than 20 billion passengers per year without charging the rider one cent.

A. BRYAN MARVIN

ALBERT G. GARRIGUES

* * * *

THE article on selecting and training of utility salesmen, which begins on page 487, is the joint product of PHILIP M. ALDEN and ALBERT G. GARRIGUES, manager and assistant manager, respectively, of the retail sales division of the Philadelphia Electric Company.

MR. ALDEN is a graduate of the Massachusetts Institute of Technology (BS 22) who served with Stone & Webster Service Corporation in Kentucky, Louisiana, and Rhode Island before joining Philadelphia Electric Company in 1930. MR. GARRIGUES is a graduate of the Haverford College (BS), and after service with the AEF he joined the Philadelphia Electric Company in 1923.

* * * *

ALSO included in this issue, beginning page 515, is Part I of our usual annual Appendix containing the principal addresses before the recent Section of Public Utility Law meeting of the American Bar Association.

THE next number of this magazine will be out October 22nd.

The Editors

Coming IN THE NEXT ISSUE

★

DIVIDEND PAY-OUT—TODAY

Strange though it may seem during the recent periods of heavy plant expansion, some public utilities have been criticized in investment circles because of overconservative if not downright niggardly dividend pay-out policy. Challenging the old idea that dividend payments should be held at a low level when so much money has to go out for construction, the policy for more liberal dividend payments has been gaining increasing recognition during the past two or three years. W. F. Stanley, vice president and secretary of the Southwestern Public Service Company, was one of the earliest exponents of improving the popularity of utility shares by boosting the dividend. In this article he gives a mathematical demonstration of the benefits from liberal dividend pay-out, not only in terms of financing but also better stockholder relations. He concludes that the dividend pay-out is more important to most stockholders than earnings per share, although anticipation of larger dividends in the future is, of course, a factor in valuing stock.

THE DISTRICT MANAGER—UNSUNG HERO

Harold H. Young, senior partner of Eastman, Dillon & Co., has written an unsolicited testimonial from the standpoint of an investment banker. He has been taking busman holidays during his vacations in recent years by visiting public utility companies all over the country. From these travels, which carried him to every state in the Union, he concludes that the district manager is the official who can make or break the company at the grass-roots level—the one who really makes the wheels turn at the point of direct contact between the utility and its customers. Mr. Young finds that the utility industry is both fortunate and well served in the selection of high-quality, conscientious people holding up their end of the business as district managers.

ADDRESSES ON UTILITY PROBLEMS BEFORE THE AMERICAN BAR ASSOCIATION—APPENDIX. Part II.

Part II of the Appendix will be published in the next issue of PUBLIC UTILITIES FORTNIGHTLY, which will be out October 22nd. Part II will contain addresses at the Boston meeting of the Section of Public Utility Law of the American Bar Association given by the following speakers: John B. Prizer, general counsel, Pennsylvania Railroad Company, Philadelphia, Pennsylvania; Francis X. Welch, managing editor, Public Utilities Fortnightly, Washington, D. C.; Stuart F. Kosters, assistant appraisal manager, Stone & Webster Engineering Corporation, Boston, Massachusetts; D. F. Houlihan, partner, Price Waterhouse & Company, New York, New York; and Albert H. Gordon, partner, Kidder, Peabody & Company, New York, New York.

★

Also . . . ***Special financial news, digests, and interpretations of court and commission decisions, general news happenings, reviews, Washington gossip, and other features of interest to public utility regulators, companies, executives, financial experts, employees, investors, and others.***

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

CRAWFORD H. GREENEWALT
President, E. I. du Pont de Nemours & Company, Inc.

"The older and more established callings have done much for the improvement of mankind, and continue to do so. There is no disparagement in the reflection that none has ever accomplished so much in as short a time."

SINCLAIR WEEKS
Secretary of Commerce.

"In regulating utilities and in managing other things, it is cheaper for the public in the long run to have those that serve it well-fed and strong, rather than half-starved and weak. There are ways of getting good service out of the strong. No one can get it out of the weak."

M. H. FRANK
Executive vice president, Wisconsin Power & Light Company.

"There is no reason to believe that because [there] are . . . new faces in the White House that there will be any appreciable lessening of public ownership pressure on the electric industry. The public power philosophy has too long a history for overoptimism. It will still have too many proponents in places of influence to permit any relaxation."

ARTHUR C. SHEPARD
Judge, Superior Court of the State of California, County of Madera.

"Peculiarly, there sometimes seems to be in the minds of many individuals some sort of guaranty of fair play wherever an official of the government is in control. But there is no magic in a name. Governments can be, and often are, even more despotic than individuals, with the wrong person in public office. A rule by law is the only guaranty of freedom."

LEONARD E. READ
President, The Foundation for Economic Education, Inc.

"Let government confine itself to defending the life, liberty, and property of each of us equally. Leave all *creative* action to men acting freely, all *creative* energy flowing unrestrained and uninhibited. Only the release of energy can produce abundance, be it material, intellectual, or spiritual. Given abundance and unrestrained freedom to act creatively, there will be as much good done by each for others as can be done."

DOUGLAS McKAY
Secretary of the Interior.

"True conservation is not a negative thing, not a hoarding of the riches man has found in the past and wishes merely to possess. Conservation is a positive thing, a method of making the fullest use of every resource that has been bestowed on man. Conservation connotes the turning of a key. But it is not turning a lock on what has already been found; it is the turning of the key to open new possibilities for usefulness."

JOHN J. PARKER
Chief Judge, Fourth United States Circuit Court of Appeals.

"Unless speech is free for everybody, it is free for nobody."

REVEREND JAMES W. FIFIELD, JR.
Pastor, First Congregational Church of Los Angeles, California.

"Destruction of the so-called rugged individualists has left a vacuum in our nation not unlike that which sucked Mao Tse Tung into control of China."

Excerpt from The Guaranty Survey, published by Guaranty Trust Company of New York.

"Vigorous and enduring economic expansion requires not only that adequate amounts of capital be available but also that a sufficient proportion of the capital be of the risk-taking kind."

B. L. ENGLAND
President, Atlantic City Electric Company.

"When we remember that the electrical industry itself is the concrete multimillion-dollar embodiment of what was once considered the wild figment of an individual imagination, nothing seems impossible."

HENRY E. FORD
Director, development department, E. I. du Pont de Nemours & Company, Inc.

"Ownership of industry has become increasingly institutionalized—that is, the stock is held in portfolios of insurance companies, banks, endowment funds, investment trusts, etc. Every American who has life insurance or a savings account has a share in this nation's business."

W. W. TOWNSEND
New York economist and investment counselor.

"Recent depressions and recessions have been caused by or accomplished by a collapse of a debt pyramid and the year ahead is threatened by a pyramid of private debt. It is the consumer debt, the money owed by individuals who have acquired today's satisfactions out of tomorrow's income, which is the basis for serious concern."

PRESSLY H. MCCANCE
President, Duquesne Light Company.

"The ability of the electric industry to provide electric service to residential customers at a consistently lower average price per kilowatt hour during a period of higher and higher costs has stimulated the desire and willingness of people to electrify housework and chores. Less and less attention is being paid to the added kilowatt hours or added cost as represented in monthly bills. People know by now that electric service is the biggest bargain in the family budget."

EUGENE S. LOUGHLIN
Former president, National Association of Railroad and Utilities Commissioners.

"It is to everyone's advantage that service standards be as high as possible and rates as low as possible. The commission which misconceives its position and presumes that its principal purpose is to oppose the industry can do no one any good. If it becomes so persuaded of the infallibility of management or is so inadequately staffed that it is unable effectively to question the policies of the companies, the injury to the public and the investor, although indirect, is no less serious."

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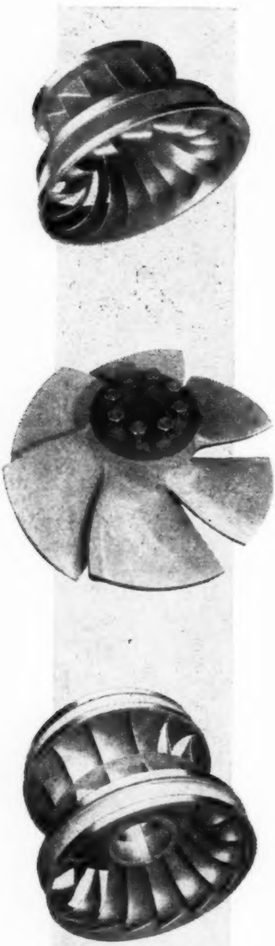

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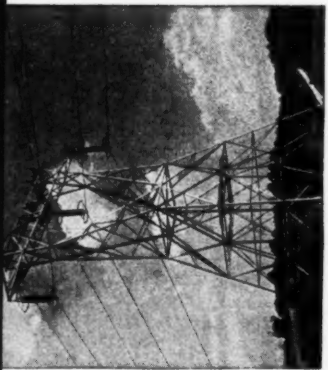

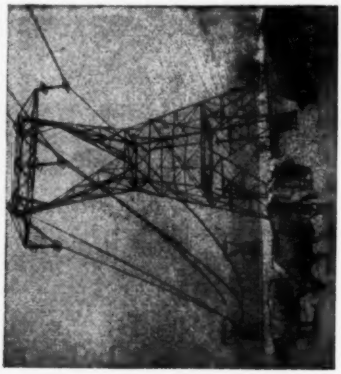

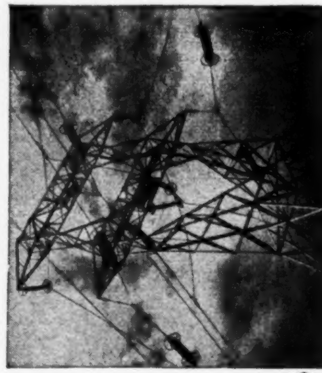

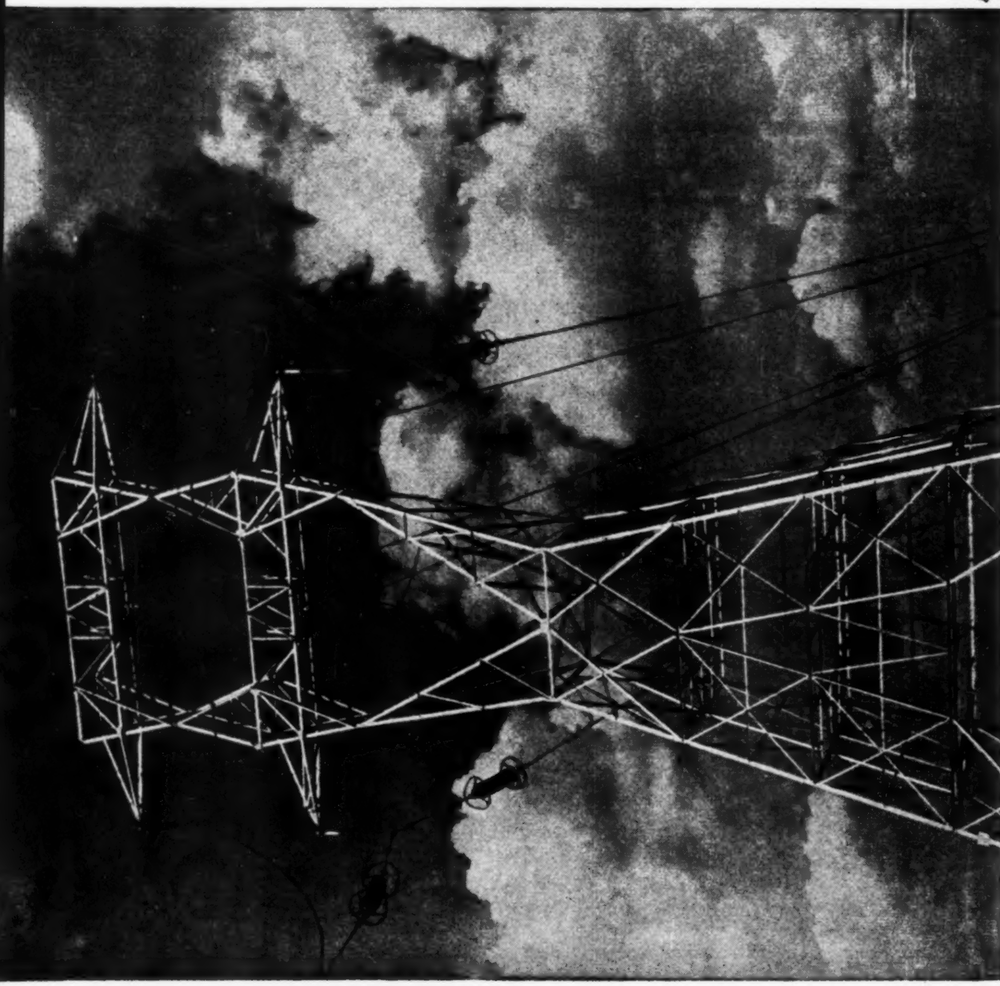

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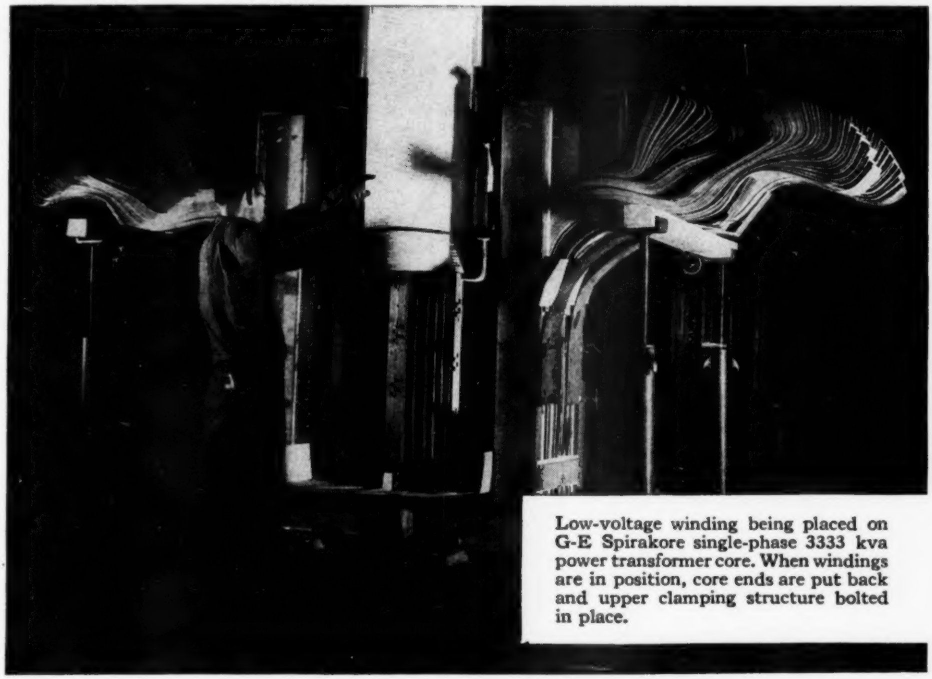

Low-voltage winding being placed on G-E Spirakore single-phase 3333 kva power transformer core. When windings are in position, core ends are put back and upper clamping structure bolted in place.

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*Registered trade-mark of General Electric Co.

GENERAL ELECTRIC

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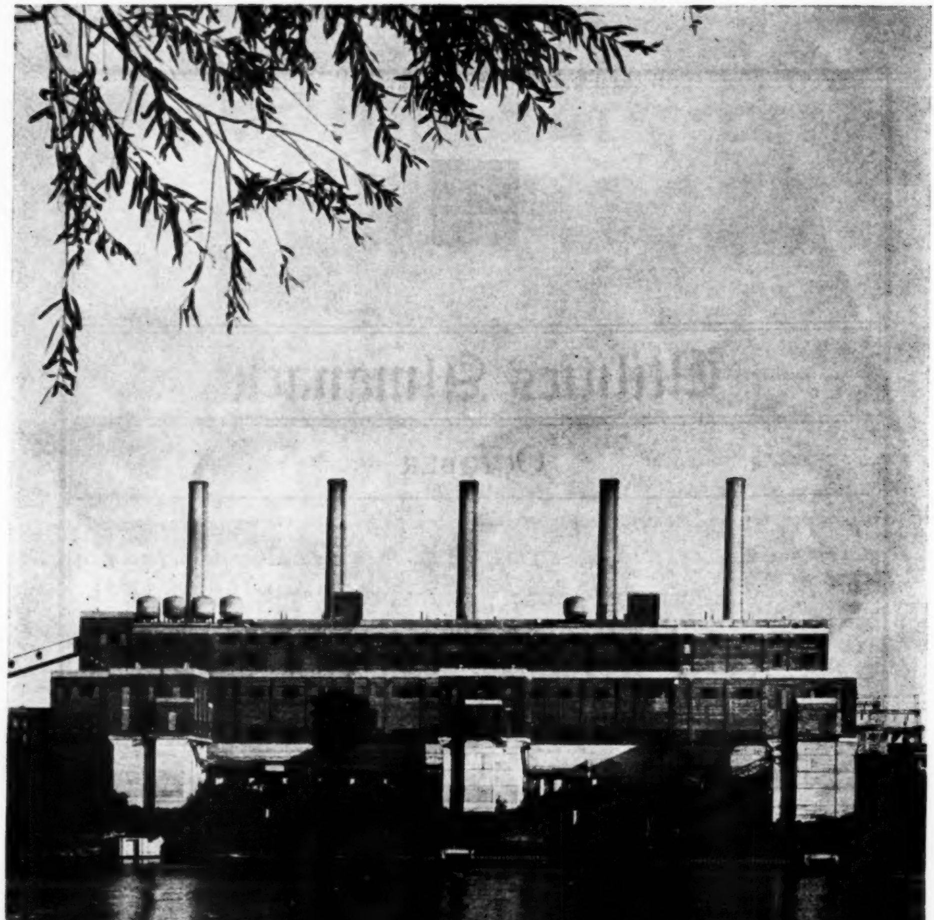
Utilities Almanack

October

8	Th	¶ *Edison Electric Institute, Transmission and Distribution Committee, begins meeting, Minneapolis, Minn., 1953.*
9	F	¶ *National Conference on Industrial Hydraulics ends, Chicago, Ill., 1953.*
10	Sa	¶ *Association of Edison Illuminating Companies ends 3-day annual meeting, White Sulphur Springs, W. Va., 1953.*
11	S	¶ *American Water Works Asso., Florida Section, begins meeting, Miami, Fla., 1953.* ¶ *National Asso. of Electrical Distributors begins meeting, Coronado, Cal., 1953.*
12	M	¶ *United States Independent Telephone Association begins national convention, Chicago, Ill., 1953.*
13	Tu	¶ *Electrical Association of Philadelphia begins progress show, Philadelphia, Pa., 1953.* ¶ *Iowa Utilities Asso. ends 2-day management conference, Des Moines, Iowa, 1953.*
14	W	¶ *American Water Works Asso., Iowa Sec., begins meeting, Waterloo, Iowa, 1953.* ¶ *American Management Asso. ends 3-day conference, New York, N. Y., 1953.*
15	Th	¶ *New England Gas Association, Operating Division, begins meeting, Springfield, Mass., 1953.*
16	F	¶ *Southern Gas Association begins transmission accounting conference, Houston, Tex., 1953.*
17	Sa	¶ *American Gas Association will hold annual convention, St. Louis, Mo., Oct. 26–29, 1953.*
18	S	¶ *American Water Works Association, Southwest Section, begins annual meeting, Houston, Tex., 1953.*
19	M	¶ *National Metal Exposition begins, Cleveland, Ohio, 1953.* ¶ *National Safety Congress and Exposition begin, Chicago, Ill., 1953.*
20	Tu	¶ *Association of American Railroads, Communications Section, begins meeting, San Antonio, Tex., 1953.*
21	W	¶ *American Standards Association ends 3-day annual meeting, New York, N. Y., 1953.*



Power Fortress at Paddy's Run

Generating plant of the Louisville Gas & Electric Company, as seen from the Indiana shore of the Ohio river.

Public
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Justice for Utility Holding Company Equities

Because of Securities and Exchange Commission regulations promulgated in 1941, regarding consolidated income tax returns, holding companies earned comparatively less for their stockholders than corresponding operations by the independent operating companies. This article analyzes the reasons for early consideration by the SEC of proposed changes in regulations that would give the holding company stockholders an even break.

BY FRANK D. CHUTTER*

IN spite of the substantial operating economies and financial benefits contributed by holding companies to their operating subsidiaries, the operating expenses and Federal income taxes of public utility holding companies come out of the pockets of the investors rather than being paid by the customers. For instance, the Southern Company claims that "the integrated operation of this system saves $6,000,000 a year as compared to the cost of operating each system independently." All of these benefits accrue to the subsidiary operating companies and their customers but the $1,000,000 expenses and $1,200,000 Federal income taxes are paid by the Southern Company and reduce the amount of earnings available for dividends on the Southern Company's common stock.

To eliminate all the inequities of this type will take considerable time and

*Utility specialist, Massachusetts Investors Trust. For additional personal note, see "Pages with the Editors."

probably will be accomplished in three stages: the first, by a change in a rule promulgated by the Securities and Exchange Commission in 1941 governing the allocation of Federal income taxes between the various companies participating in a consolidated income tax return; the second, by repeal of the 2 per cent penalty for filing a consolidated tax return; and third, by the gradual recognition by regulatory authorities that holding company expenditures are made for the benefit of the operating companies. Except to point out the existence of the over-all problem and to indicate the relative importance of the two major aspects of the problem, let us take a look at one definite Federal income tax inequity. The elimination of this injustice can be obtained fairly promptly.

PURELY for the purpose of illustration, the hypothetical comparison is made in the table below, showing the impact of holding company expenses and Federal income taxes on the rate of return earned by an operating company as compared to the rate earned by a holding company.

In the hypothetical case, it is evident that the effective rate of return being obtained by the holding company system is 5.6 per cent or materially less than the 6 per cent being obtained by the independent operating company. From the viewpoint of the common stockholder, who must be enticed to part with his savings in exchange for utility equity investments, the effect of the holding company expenses and taxes is to reduce the earnings applicable to his holding company stock to \$3.30 per share or 10.8 per cent less than \$3.70 per share earnings of the operating company. Unless something is done to eliminate this inequity, a gradual shifting from holding company to operating company common stocks is likely to take place.

The relative size of the tax problem and the operating expense problem is indicated in the tabulation on page 475 which shows for a representative group of holding companies, consolidated capitalization and surplus, holding company operating expenses (exclusive of Federal income taxes) in dollars and as a percentage of total capitalization, and holding company

	One Operating Company (000)	*Combined Total of Three Operating Companies (000)*
Assumed Rate Base	\$100,000	\$100,000
Assumed Allowed Rate of Return	6.0%	6.0%
Assumed Return	\$ 6,000	\$ 6,000
Fixed Charges (\$50,000,000 @ 3¼%)	\$ 1,625	\$ 1,625
Preferred Dividends (\$15,000,000 @ 4.5%)	675	675
Holding Company Operating Expense	—	200
Holding Company Federal Income Taxes	—	200
Total Deductions	\$ 2,300	\$ 2,700
Balance for Common Stock	\$ 3,700	\$ 3,300
Publicly Held Common Stocks (000 Shares)	1,000	1,000
Earnings Per Share	\$ 3.70	\$ 3.30
Effective Allowed Rate of Return	6.0%	5.6%

income taxes in dollars and as a percentage of capitalization.

The tabulation on page 477, based on 1952 data, shows that the holding company operating expenses, exclusive of Federal income taxes, averaged 0.17 per cent of total capitalization and surplus and that the percentages ranged from 0.08 per cent to 0.35 per cent. Similarly the holding company Federal income taxes averaged 0.21 per cent of total capitalization and surplus and ranged between 0.17 per cent and 0.25 per cent. Thus, the tax problem is slightly more important than the operating expense problem.

FORTUNATELY, that part of the tax problem which relates to the method of allocating Federal income taxes to the various units which participate in a consolidated return is susceptible to rather prompt action. Numerous public utility holding companies had been pressing the Securities and Exchange Commission to modify their rule[1] which controls this allocation. Under the leadership of Donald Cook, who was chairman of the commission at the time, the Securities and Exchange Commission requested comments and suggestions on March 12, 1953, concerning possible changes in this rule. An inquiry at the office of the commission brought out the fact that eight state commissions and two Federal commissions had replied and in general recorded opposition to any change, and some sixteen holding companies came out for a drastic change in the rule. Not one investor had expressed a written opinion on the matter. It is hoped that one of the first things to be done by Mr. Demmler, the new chairman of the Securities and Exchange Commission, will be to set an early date for a formal hearing on this matter and see that the proceeding is completed promptly. Investors can help by giving the Securities and Exchange Commission their views on this rule.

THE pertinent part of this rule as it now exists and as it applies to the present problem reads as follows:

> No registered holding company . . . shall, directly or indirectly, lend or in any manner extend its credit to nor indemnify . . . any company in the same holding company system. . . .

Among the specific exceptions is (b) (6):

> . . . an agreement of indemnity arising out of a consolidated tax return filed by a holding company (or other parent company) and its subsidiaries:

[1] U-45 (b) (6).

	(000) Consolidated Capitalization % Surplus	Holding Company Operating Expenses (000) Amount	% of Cap. & Surp.	Holding Company Federal Income Taxes (000) Amount	% of Cap. & Surp.
American Gas & Electric	$ 778,910	$ 630	0.08%	$1,776	0.23%
American Natural Gas	348,315	824	0.24	575	0.17
Central & South West	316,683	253	0.08	655	0.21
Consolidated Natural Gas	340,587	1,193	0.35	720	0.21
General Public Utilities	466,183	1,247	0.26	1,178	0.25
Middle South Utilities	394,013	581	0.15	723	0.18
Southern Company	643,731	1,012	0.16	1,195	0.19
Total	$3,288,412	$5,740	0.17%	$6,822	0.21%

Provided, That the top company in the group assumes primary responsibility for the payment of any tax liability involved, subject to the right to contribution from the several members of the group in an amount not exceeding as to any company that percentage of the sum of the normal tax, surtax, and excess profits tax on a consolidated basis which the sum of the normal tax, surtax, and excess profits tax of such company if paid on a separate return basis is of the aggregate amount of normal, surtax, and excess profits taxes of the individual companies based upon separate returns.

TAKING American Gas & Electric Company as an illustration and using data from the 1952 U5S report to the Securities and Exchange Commission, the amount of net income contributed by each of the companies in the system and the allocation of taxes under the existing rule was as shown in the table on page 477.

It would seem unfair for a holding company, that had a deficit of $1,493,000 before considering dividends from the subsidiaries which were included in the consolidated tax return, to be charged with income taxes of $1,776,000, thereby increasing the indicated deficit to $3,269,000. This is particularly difficult unless the utility commissions in the states where the subsidiaries of American Gas & Electric Company operate, allow for rate-making purposes the full amount of Federal income taxes which they would have paid on a separate return basis rather than the amount allocated to it under the present Securities and Exchange Commission rule. Certainly any rule which operates to make an arbitrary gift to the customers of a utility at the expense of the common stockholders is open to criticism. The only possible argument in favor of the rule as it now stands is merely that it reduces the costs which must be recouped from the ratepayer. Fortunately, the Securities and Exchange Commission is charged with the duty of protecting the interests of investors as well as those of the consuming public.

A NUMBER of utility holding companies have proposed amendments to this rule. The following is a typical suggestion and shows the addition of new material by italics:

(6) A loan or extension of credit or an agreement of indemnity arising out of a consolidated tax return filed by a holding company (or other parent company) and its subsidiaries: Provided, That the top company in the group assumes primary responsibility for the payment of any tax liability involved, subject to the right to contribution from the several members of the group in an amount not exceeding as to any company that percentage of the sum of the normal tax, surtax, and excess profits tax on a consolidated basis which the sum of the normal tax, surtax, and excess profits tax of such company if paid on a separate return basis is of the aggregate amount of normal, surtax, and excess profits taxes of the individual companies based upon separate returns. In computing each company's tax on a separate return basis, *the gross income of each company in the group shall be computed without including therein dividends received from other companies in the group and* allowance shall be made for loss carryover and other adjustments as if the company had always filed its tax returns on a separate return basis *with such dividends excluded from gross income. In no event, however, shall the liability allocated to an individual company exceed the amount of normal, surtax, and excess profits tax of such company based upon a separate return.*

Company	*Pretax Earnings* (000)*	*Federal Income Taxes (000)*	*Provision Deferred Fed. Inc. Taxes (000)*	*Net Income (000)*
Appalachian Electric Power Co.	$20,442	$ 7,986	$ 601	$11,855
Central Ohio Light & Power Co.	799	381	—	418
Indiana & Michigan Electric Co.	13,173	5,277	568	7,328
Kentucky & West Virginia Power Co.	2,091	1,002	13	1,076
Kingsport Utilities, Inc.	390	172	—	218
The Ohio Power Co.	22,182	9,622	373	12,187
Wheeling Electric Co.	1,066	508	—	558
Ten Smaller Companies	1,474	533	—	941
American Gas & Electric Co.-Parent Company Basis	(1,493)	1,776	—	(3,269)
Total	$60,124	$27,257	$1,555	$31,312
Eliminations	$ 1,058	$ (152)	—	$ 906
Dividends on Preferred Stocks of Subsidiaries, Publicly Held	3,066	—	—	3,066
American Gas & Electric Co.-Consolidated	$56,000	$27,105	$1,555	$27,340

*Net income as reported to stockholders, plus Federal income taxes and provision for deferred Federal income taxes. Taxable income as reported in income tax returns is not published.

THE provision in the proposed amendment that the amount of income tax allocated to an operating company in a consolidated tax return shall never exceed the amount of such company's tax on a separate return basis gives ample assurance to the state regulatory authorities. No utility executive concerned with regulatory matters could expect any state commission to allow income taxes on an operating company in an amount in excess of that computed on a separate return basis. On the other hand, no public utility commission can oppose the purpose and theory of the proposed amendment, as distinct from its phraseology, without running the risk of being charged with bias. Certainly investors in public utility common stocks would be well-advised to ascertain what commissions, if any, oppose the proposed change in Rule U-45 (b) (6) and what commissions actively support the change and then arrange their utility equity investments accordingly.

It is hoped that the Securities and Exchange Commission will take steps promptly to set a date in the very near future for a hearing on this matter and then issue a new rule effective January

1, 1953. Prompt action is imperative. A number of operating companies currently are involved in rate proceedings. If the revised rule is issued one day after a rate determination has been made, then the decision will have no helpful effect on that operating company until once again its rates are under review. In at least one jurisdiction, two years must elapse before another change in rates may be made.

ASSUMING the rule is amended along these suggested lines, the effect on the taxes and earnings of the various units in the American Gas & Electric Company would be roughly as shown in the table below.

This tabulation shows that, while the aggregate amount of Federal income taxes payable by the American Gas & Electric system remains unchanged, the portion payable by the parent company is reduced from about $1,776,000 to some $118,000 and the amounts payable by the subsidiaries are increased by an aggregate of $1,658,000. In the event that the revenues of the underlying companies were to be increased in an amount sufficient to absorb such increased taxes, then consolidated earnings would be increased by 13 cents per share, or 5.5 per cent.

UNDER the proposed rule, American Gas & Electric Company would have no Federal income tax payable on a separate return basis, but would be obliged to pay a tax of roughly $118,000, because the Federal income tax on a consolidated return basis would exceed by that amount the aggregate of the taxes on separate return bases. The ultimate cause of this situation is the fact that the tax rate is 2 per cent greater on a consolidated tax return than on separate tax returns. Here again is one of those tax inequities which could be eliminated, at least as far as it applies to public utility companies.

Reports emanating from Washing-

Company	*Pretax Earnings (000)*	*Estimated Federal Inc. Taxes under Present Rule (000)*	*Proposed Rule (000)*	*Changes In Taxes (000)*	*Prov. Defer. F.I.T. (000)*	*Net Income (000)*
Appalachian Electric Power	$20,442	$ 7,986	$ 8,512	+$ 526	$ 601	$11,329
Central Ohio Light & Power	799	381	406	+ 25	—	393
Indiana & Michigan Electric ...	13,173	5,277	5,626	+ 349	568	6,979
Kentucky & West Va. Power ...	2,091	1,002	1,068	+ 66	13	1,010
Kingsport Utilities	390	172	183	+ 11	—	207
The Ohio Power Company	22,182	9,622	10,250	+ 628	373	11,559
Wheeling Electric	1,066	508	541	+ 33	—	525
Ten Smaller Companies	1,474	533	553	+ 20	—	921
American Gas & Elec.-Parent ..	(1,493)	1,776	118	— 1,658	—	(1,611)
Total	$60,124	$27,257	$27,257	—	$1,555	$31,312
Eliminations	$ 1,058	($ 152)	($ 152)	—	—	$ 906
Preferred Dividends of Subsidiaries Publicly Held ...	3,066	—	—	—	—	3,066
American Gas & Electric Co.-Consolidated	$56,000	$27,105	$27,105	—	$1,555	$27,340

ton indicate that witnesses before the House Ways and Means Committee were unanimous in asking for the repeal of both the 2 per cent penalty tax on consolidated returns and taxation of 15 per cent of intercorporate dividends. Investors might well urge that these tax adjustments be made.

BEFORE the days of the Securities and Exchange Commission, there was much justification for the strict prohibition of the absorption of holding company expenses by operating companies because of numerous abuses by a number of holding company systems. Today the story is different. Virtually all holding companies have either been dissolved or made to conform to the strict standards of the Public Utility Holding Company Act of 1935.

In effect, each holding company has had to justify its continued existence. In an economic sense, this meant that the economies to be obtained from the continued operation of a holding company had to exceed the expenses of the holding company. Even if the operating expenses of the holding company were to be allocated equitably to the individual operating companies, in no instance would the expenses of an operating company be in excess of what they would have been if the common stock were owned by the public rather than by a holding company. Moreover, holding companies continue to operate under the watchful eyes of the Securities and Exchange Commission. As matters now stand, the operating companies in a holding company system receive all the benefits of system operation but do not pay all of the system expenses.

"MANAGEMENT *plainly has the obligation to take affirmative steps to scrape away the barnacles of misunderstanding. It must not only demonstrate; it must explain. It must shed light so that the people will become aware of inherent values in our business system. The people are entitled not only to know what we are doing, but why we do it.*

"Now how can we create this understanding? How can we educate the man in the street to distinguish between what is sound, and what is unsound, what is good, and what is bad. How can we win the people away from the false economics taught and advocated in the last twenty years, and re-educate them in the fundamental values which have made this country great? . . .

"What could be more effective than a mutual effort, co-operative only in the sense that we all are participating, in which every management takes steps to spread understanding among its stockholders, its employees, and the people of the communities where it does business? This is the simple method, and because of its very simplicity, it is more likely to produce results.

". . . I am confident that if business managements tell their story in the business precincts, where they have the respect and confidence of their own people, our system will have the understanding, sympathy, and support of all the people of the United States.

"That is the way we can rebuild good will between management and nonmanagerial employees. That is the way we can turn back Socialism and Communism. That is the way we can demonstrate that with invention and technology forever opening up new vistas, we can never cross a last frontier, and we can never have a mature economy."

—HENRY E. FORD,
Director, development department,
E. I. du Pont de Nemours & Company, Inc.

An Unregulated "Utility"

If office building elevator operators charged passengers for their service, it could easily become the most widely patronized public utility industry in the nation. But because there is no charge or rate, it has not been subjected to regulation.

BY A. BRYAN MARVIN*

WHAT would you think of a transit system with 100,000 vehicles that carried more than 20 billion passengers a year? Such a feat is accomplished, right here in America, and without benefit of state or Federal regulation. Passengers, employees, and investors are all happy.

If you travel across a city in anything but a private car the chances are that your trip will be pretty thoroughly regulated by a public agency. But if you travel between the various floors of an office or apartment building in an elevator, your trip will be totally free of regulation.

The elevator systems of American cities are said to carry more passengers every day than all the horizontal transportation networks of those same cities combined.

In a city of tall buildings, elevator service is nearly essential. Without it, tenants are uncomfortable and the community's business and industrial life are threatened. Still, primarily because the elevators are located 100 per cent on private property and require no franchise, the vertical transporta-

*Press relations and public information department, Consolidated Edison Company of New York, Inc. For additional personal note, see "Pages with the Editors."

tion business has not been subjected to regulation. There is no public hue and cry to place it under such a jurisdiction. Elevator service appears to be as close to public utility service as one can get without receiving or requiring the benefit of any regulation except that of safety and maintenance inspection.

THERE is a lesson for the regulated public utility in the experience of the elevator builder and operator. They provide a living case history in which the American enterprise system and free competition have performed the regulatory chore to perfection with no aid from the state. It may even be said that these forces were doing their work in the public interest long before the first state regulatory group was established.

Elevators are not a modern innovation. Their history can be traced back to the time when Greece was the cultural leader of the world. Where the philosopher-scientist Thales was the first to outline experiments with static electricity, Archimedes worked out the mathematics of compound pulleys.

Pulley arrangements, under the Greek title of *polyspaston,* were used centuries before the birth of Christ to hoist massive building blocks into place. The first elevator passenger in history was probably a carefree workman who rode one of those blocks up to its final location.

In 530 A.D. the Emperor Justinian I built a fort on Mount Sinai overlooking the Red Sea. The fort gradually became the monastery of St. Catherine and a monk-powered capstan hoist was installed to help visitors over the solid walls, which the military had designed for sieges instead of peaceful pursuits.

In the seventeenth century human comfort became a consideration. The sedan chair, a sort of hand-decorated chair equipped with doors, windows, and handles by which it could be carried, came into popularity in France. An ingenious mechanic named Villayer got the idea of suspending a sedan chair in a stair well or in a shaftway built into a thick wall, and using it to go up and down.

IN climbing a flight of stairs a human works up to fourteen times as hard as in crossing a level floor, so even though buildings of the day were only two or three stories high, Villayer's business was brisk. "Flying chairs," as they were termed, were put in Parisian townhouses and in summer places at Chantilly and Versailles. These were true elevators in that their mechanisms included counterweights which more than overcame the weight of the car and a passenger. Two lackeys would crowd into the chair and ride it downward. They would latch it into place preparatory to the lord's up trip, which he made alone.

The device had an assured future until one night at the Versailles palace when a favorite daughter of Louis XIV entered her private "flying chair" to get upstairs to bed. Part way up, the duchess stuck. Since the car was built into a fairly thick wall she had to whoop for some time before help came. It took additional time to break through the wall and release her. In all, the machinery held her prisoner for a good three hours.

The king's fury knew no bounds, according to contemporary reports, and the "flying chairs" became a lia-

bility instead of an asset to the court-conscious nobility. Villayer made good in other fields and the invention was practically forgotten.

In the first half of the nineteenth century the elevator idea was revived, not as a luxury but as a work tool for building industry. There was a problem involved in getting barrels and bales of raw material up to the work level and bundles and packages of finished goods down to the shipping level.

At first the common hoist was used. A rope was tied to a platform and a horse or a steam engine pulled at the other end to lift the load. This would do the job very nicely until the rope broke. Then the load and the employees who had dared ride with it went nonstop to the basement.

If the smash was spectacular enough, it made the local papers, usually with a caption reading "Fatal Plunge." No building operator would have dreamed of installing a passenger hoist. At the most posh hotels of the world, travelers climbed to their rooms of an evening.

In 1852, Peter Cooper, the American inventor and iron magnate, cracked this front of architectural apathy. Designing Cooper Union, the first iron-framed structure in New York city, he left a shaftway for the passenger elevator which he felt sure would eventually be made practical.

With little more than inspiration to guide him, he made one mistake. On the theory that people in cross section are primarily circular, he made the shaftway round instead of rectangular.

Two years after the Cooper Union design was committed to paper, a mechanic from Yonkers, New York, set up an elevator exhibit at New York's Crystal Palace Exposition, a trade show then receiving national attention.

The device carried Elisha G. Otis up and down until a fair crowd was gathered in his part of the hall. Then, to the accompaniment of a gasp from the public, he would draw a hunting knife and slash the supporting rope. The car would drop slightly and catch in mid-air as a wagon spring once bent by the weight of the suspended car straightened and its ends engaged teeth built into the guide rails.

The "safety platform" put Otis into the elevator business and the industry began to move up in more ways than one. Architects were delighted. With one eye on Peter Cooper's iron framing which did away with load-bearing walls and another on the elevator which eliminated stair climbing, they

¶ "THERE *is a lesson for the regulated public utility in the experience of the elevator builder and operator. They provide a living case history in which the American enterprise system and free competition have performed the regulatory chore to perfection with no aid from the state. It may even be said that these forces were doing their work in the public interest long before the first state regulatory group was established."*

sketched buildings so tall that even city dwellers were dizzied.

The wagon spring brakes did not completely solve the safety problem, always one of the most important considerations in any transportation system. If the rope broke near the cab it worked fine. But if the break was at the engine end of the line, the drag of the rope as it passed through the pulleys kept the spring bent until the falling load reached such a speed that sheer momentum carried it right through the safeguards.

In those times, people did not turn to a regulating authority to get safety. They merely turned away from a device that proved unsafe in operation. Elevator companies came and went like scattered quicksilver. A new gearing which gave faster service would boom a new firm and it could book orders into the distant future. A smash in which heads were cracked canceled the orders just as quickly. Many of the designs which were excellent from a technical point of view had to be discarded because of a single equipment failure.

SAFETY became a fetish with those firms that wanted to stay in business. Safety controls blossomed and pyramided on top of each other. Trick pits were built at the bottom of elevator shafts with oil buffers and compressed air devices to cushion runaway cars. They made it possible to drop cars a full twenty floors with a basket of eggs riding the fall and still uncracked at the bottom.

The safety record of American elevators is nothing short of fantastic. In spite of the volume of traffic, a recent 12-month period found only 380 accidents involving personal injuries, 61 of which were fatal. Practically all the accidents involved old-time equipment and the most common failure was a human one. Impatient travelers insist on leaning into the shaft to see if the car is coming. All too often it is.

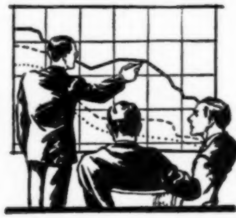
Even the old equipment can be kept up to date with new controls and safeguards. One bank of elevators in a New York city office building is doing the job for which it was installed in 1884, and doing it well.

Municipalities keep an eye on elevator safety in the same way that they protect the public from falling buildings. Trained inspectors hunt through the elevator system for fatigued metal and worn or eroded parts. This is as close to regulation as the elevator industry has come.

Fares in any transit system are a result of calculations involving original costs and operating costs. This is the point at which public dissatisfaction is most likely to be apparent.

In America, passengers pay no direct fare for elevation or descent. The costs are tucked away in building operating charges and paid indirectly by tenants. This practice is not universal. In Algiers, for example, the cars are coin operated and if you don't have the right change you won't ride. The elevator denomination coins are in perpetual short supply because the riders hoard them. This leads to confusion and aggravation, and to outright anger when the car stops in mid-flight after it has collected the fare.

COMPETITION rather than regulatory restrictions limits the original cost of an elevator. About eighty companies manufacture and sell up and down



Indoor Rocket Rides Are Possible

"ELEVATOR *engineers have done so well that they now can build an elevator much taller than the highest building architects are able to justify economically. Only passenger comfort prevents them from putting into service some really terrifying rides. While the prescribed rate of descent for airliners is 500 feet a minute, some of the high-speed elevators in use today move at 1,400 feet a minute.*"

cars. Because competition is so intense, sales figures are difficult to obtain. In order to present the following paragraphs, however, the FORTNIGHTLY was able to secure some percentages.

Several times in the last few decades, professional monopoly hunters have made a target of Otis Elevator Company, largest in the field. In a recent period, this firm did about 40 per cent of the nation's passenger elevator business. The elevator division of Westinghouse Electric accounted for about 20 per cent of the trade. The third largest company, Houghton Elevator, did about 12 per cent of the business.

According to a mysterious formula of social physics, the rank-size rule, these figures indicate that a state of nearly perfect competition exists in the elevator manufacturing business.

The rank-size rule is found repeatedly in statistical tabulations of competing groups. It is said to prevail if, when the agencies are ranked by size, the product of rank and size is roughly a constant.

In the case of elevator manufacturers, Otis is first and the product is $1 \times 40 = 40$; Westinghouse, $2 \times 20 = 40$; Houghton, $3 \times 12 = 36$.

The rule is found to apply to such varied items as the frequency with which the author of a long book uses certain words, the gross business of retail corporations, business establishments when ranked by the number of paid employees.

UNTIL the American frontier disappeared early in this century, it might be said that each city competed freely with the others in attracting and holding population. It is no surprise that the rank-size rule works when applied to city population statistics in every decennial census back to 1790.

The accuracy with which figures fit

the pattern has fallen off slightly since the frontier vanished. In Europe, where there has been no frontier for centuries, the rank-size rule does not fit the present population facts at all.

This leads to the argument that the presence of the rank-size rule in a statistical column indicates a state of free competition, while its absence connotes a lack of competition.

Dr. John Q. Stewart of the Princeton University faculty, a supporter of the rank-size rule theorem, as was the late Dr. George Kingsley Zipf of Harvard, points out that some jurists hold a law of nature superior to statute law. If the theory of the rank-size rule could only be worked out so that the rule (at present merely a statistical curiosity) could be promoted to a natural doctrine, Dr. Stewart claims, it would have legal weight.

In the case of the monopoly accusations leveled against the Otis Company, the rule certainly seems to leave the burden of proof with the accusers rather than the accused.

With equipment costs held down by competition between manufacturers, the elevator industry finds its operating costs limited by competition between building operators.

The operator of an office or apartment building competes with others for tenants. Elevator service is an important factor in this contest. It must be fast and accurate and still not eat up too large a share of the rentals.

THE landlord trade has been in existence so long that the balancing of value and cost has become almost second nature to its members. Pressure for rapid, economic service comes from the landlord-operator to the elevator manufacturer and the latter's engineers try to match the equipment to the need.

Effects of this constant pressure are visible in the various driving mechanisms which have been used in elevators. When cries of "Going up," "Going down" first joined the hubbub of commercial activity, steam and hydraulic power provided the basic energy, with steam well in the lead.

BY the 1860's elevator designers were looking at hydraulics as the power source of the future. Pressure in the city water mains was sufficient to reach the top floors of buildings.

One elevator of those times was worked by means of a bucket shaped counterweight which was either filled or emptied of water to raise and lower the cab. Since the weight of the cables worked to make each ride a constantly accelerating proposition and riders were completely at the mercy of the operator, the device did not prove popular.

A more commercial invention was the plunger-type elevator. With a hole bored into the ground, a plunger fitted to the bottom of the cab was raised and lowered by valving water from the city mains into and out of the hole.

About 1880, the hydraulic elevator had nearly pushed steam-driven units off the market. The boring of holes was an expensive process, but oil field developments made the task simpler.

In 1880 a German engineer, Werner von Siemens, built an electrically driven elevator for the Mannheim Exposition, and as central station electric service spread through the United States the electric drive and the hydraulic lift locked horns. Claims on

either side were in keeping with the business techniques then prevalent.

Architects finally gave the decision to the electric drive if only because the hydraulic plungers were limited to about 380 feet and the planners wanted to go higher. With electric power, the cables to which the cab is attached are hauled up the shaft, passed around a traction drum, and then lowered into the shaft where they join the counterweight. The capacity of a winding drum or the mechanical strength of a plunger does not limit the distance a car can travel.

ELEVATOR engineers have done so well that they now can build an elevator much taller than the highest building architects are able to justify economically. Only passenger comfort prevents them from putting into service some really terrifying rides. While the prescribed rate of descent for airliners is 500 feet a minute, some of the high-speed elevators in use today move at 1,400 feet a minute. At this rate, insecurely moored stomachs can definitely feel the motion.

By World War I, the elevator had become a fact of life in built-up American cities. Since then the industry has refined and re-refined its practices, looking for efficiency and economy.

Timesaving starts and quick, accurate stops without car jiggling to get the floor of the cab level with that of the building were achieved by 1925. Automatic dispatching, which is designed to match the available cars with button-pushing passengers, came in 1940.

In recent years, completely automatic operation, even for office buildings, has been developed. Such automatic installations are estimated to save the building operator up to $7,000 a year for each car. An electronic vacuum-tube hookup can do a better job of guessing where the next up or down call will originate than an experienced human elevator operator.

In all of these advances, decisions reached in the market place have taken the place of regulatory action. Disputes between building operators and the elevator manufacturers have been settled within the framework of the free enterprise pattern.

Public acceptance of the elevator is living proof that American industry, in return for reasonable compensation, can provide adequate service in the vertical plane. With similar treatment, those same forces can satisfy the public in any dimension.

"PRIVATE enterprise, not government, makes jobs. A serious decline in business activity creates an employment vacuum which is much too large for government to fill without harming the currency, the private enterprise system, or both. It is idle to say, as was so often said during the last depression, 'If business will not create jobs, the government will.' Any such commitment is prompted by emotion, not reason, for it is a promise that cannot be kept."

—EXCERPT *from The Guaranty Survey, published by Guaranty Trust Company of New York.*

Selecting and Training Utility Salesmen

Because the people in any sales organization can make or break it, it is fundamental that those in supervisory positions should understand something of the psychology of human relations. A successful sales supervisor is a leader in the truest sense of the word. In the years ahead, selective training and supervising of utility salesmen are going to be increasingly important parts of utility management's responsibility.

By PHILIP M. ALDEN and
ALBERT G. GARRIGUES*

WHILE people are the most important part of any business or industrial activity, this is particularly true in sales work where results obtained are almost directly proportional to the effectiveness of individual contacts with others. In many ways each individual salesman is "in business for himself," in that when he is out in the field it is up to him to carry the sales negotiation through to a successful conclusion. For this reason, proper selection, training, and supervision within a sales group are of particular importance. A good salesman is automatically a *very important person.*

Because the people in any sales organization can make or break it, it is fundamental that those in supervisory positions should understand something of the psychology of human relations—the urges that move people—the inherent desire to be treated fairly and as an individual, and not just as a member of a group, or a cog in a machine. It is important to understand that, as human beings, we all have problems which often need a sympathetic ear. In other words, a successful sales supervisor must be a leader in the truest and best sense of the word, who enjoys *working with* his people as a partner, rather than just directing their activities.

With such a spirit, employee relations, which have been defined as "getting along better with our employees than we do with our relations," be-

*Manager and assistant manager, respectively, retail sales division, Philadelphia Electric Company. For additional personal note, see "Pages with the Editors."

comes a relatively minor problem. It is with the hope that it may be helpful in directing attention to some of these factors, as they apply to a public utility engaged in the manufacture and marketing of electricity and gas, that this paper has been prepared.

SELLING electricity and gas is an exacting sales job. It includes in its various phases:

1. Highly competitive selling.
2. Selling the advantages of utilization equipment to the point where the customer will buy of his own initiative.
3. Furnishing expert advice and assistance to a wide variety of customers, on a multiplicity of applications.
4. Building future markets from day-to-day contacts.

To do this type of sales job it is necessary for supervision to understand that *its first duty is building men*. It is only as a supervisor recognizes and attains this basic objective that he can be considered successful. And it is essential that all salesmen, regardless of assignment, have an opportunity to experience the real satisfaction which comes from following a creative sales job through to completion.

Basically, therefore, a successful utility salesman must be:

1. Carefully selected.
2. Carefully trained.
3. Presented with a clear opportunity for progress, in so far as his own abilities warrant, and opportunities occur.

Selling in the Various Markets

THE opportunities for the sale of electricity and gas are so varied that we must be satisfied for the purposes of this article to discuss only the principal market classifications.

These principal classifications are:

1. Residential.
2. Farm.
3. Commercial.
4. Industrial.

Before considering the problem of selecting and training people for utility sales work it is obviously important to review the type of sales work for which they are to be selected. We define these types in accordance with these principal markets:

1. *Residence Selling.* Utility sales work in the residential market naturally divides itself into two parts; that is,

(a) The sale of electricity and gas to new homes, and

(b) Selling the existing home.

There are many opportunities for the promotion of better wiring and more adequate equipment in new homes, particularly among operative builders. The objective of this phase of residential sales work must be to persuade the builder to consider the advantages to him of so equipping his homes that they will appeal to the prospective buyer, thus making them earier to sell.

The basic qualifications for successful selling to the residential builder are knowledge, integrity, intelligence, the power to persuade, coupled with a determination to succeed and a particular ability for getting along with others.

SELLING the old home market is primarily a merchandising operation and for the purpose of this article it is assumed, as a matter of policy, that the utility will engage in the direct sale of appliances to residential customers,

at the same time conducting these activities so they will encourage and promote the work of other sales outlets, and build good relations with customers.

It is recognized that the basic reason for utility merchandising is usually the lack of adequate sales promotion by other sales outlets, particularly of the newer but often important load-building appliances which have not as yet received general customer acceptance. At the same time, the principal support of the merchandising activity should come from the margin of profit in the sale of appliances. These facts, in the light of the basic policy of dealer encouragement and improved customer relations mentioned above, place a particular responsibility on the utility to make sure that its residential sales representatives are of high caliber and have a full understanding of the important part they play in representing the company through their daily contacts with the public.

The personal qualifications for a successful salesman in this field are similar to those previously mentioned in our discussion on selling the new home.

2. *Selling the Farm Customer.* Selling farm customers involves residential sales in so far as farms, in themselves, include residences. However, special training and experience in farming and farm problems is particularly desirable in this field. Graduates of recognized colleges in agricultural engineering are the best possible candidates, provided they have the basic qualifications of salesmanship, in addition to this specialized knowledge.

3. *Commercial Sales.* Selling commercial customers requires a much wider knowledge of gas and electric operations than the types of selling discussed in the preceding paragraphs. This results from the varying types of customer, as well as the great number of applications useful to business. In this field the salesman definitely benefits from a college or technical education attained either prior to employment or in night school while employed. However, a degree should not necessarily be a prerequisite for employment, as some of the most successful salesmen in this market have not had an opportunity for higher education, but have had the essential qualifications which, supplemented by intensive training on the job, have made it possible for them to succeed.

4. *Selling Industrial Customers.* Many of the duties involved in selling industrial customers can be per-

¶ "WHILE *people are the most important part of any business or industrial activity, this is particularly true in sales work where results obtained are almost directly proportional to the effectiveness of individual contacts with others. In many ways each individual salesman is 'in business for himself,' in that when he is out in the field it is up to him to carry the sales negotiation through to a successful conclusion."*

formed by well-trained, practical salesmen, who have not had the advantages of a technical education. However, it is particularly desirable to fill a large proportion of these sales jobs with technically trained men. With this background, there is no substitute for experience in the field, rubbing shoulders with plant superintendents, engineers, and maintenance men, and becoming familiar with operating problems through field experience.

This market is the broadest of all in so far as the number of applications is concerned, and, therefore, the industrial salesman should have available men especially trained in such matters as air conditioning, heating, lighting, etc., to assist him on specialized problems.

In general, it is axiomatic that in order to develop an organization to sell these various markets we must select and train our men with the greatest possible care. Time taken in selection and training will pay substantial dividends in subsequent years.

Selection and Training of Sales Personnel

SALESMEN who meet the qualifications that are essential to utility sales work are always hard to find, and particularly so at the present time. Therefore, the first problem is not so much one of selection as it is of attracting the type of man we are looking for. Even today this can be done if three conditions are met:

1. The starting salary compares favorably with the salary obtainable elsewhere.
2. The opportunity for advancement, for men with ambition and ability, is clearly defined, and
3. The enthusiasm of the presently employed salesmen for their jobs is contagious.

Developing this enthusiasm for the job is definitely tied in with the salesman's income and opportunities, plus those sometimes intangible but all-important factors which are the principal subject of this article.

Having attracted men to a favorable consideration of utility sales work, they should then be carefully screened by an interviewer in the personnel department. This is true whether the applicants are employees of other departments of the company, or whether they come from the outside. Aptitude testing has been tried but it does not seem to be too helpful in selecting men for sales work. The most valuable method of selection is a carefully planned personal interview by one who is experienced in seeking out those personality factors which are most important. Fundamentally, this is done best when the applicant is put at his ease and encouraged to talk about his interests, his education, and his experiences, as well as his personal likes and dislikes. Such an interview takes time, but a casual friendly approach of this nature develops a picture of the applicant's personality which is most important in making a selection.

IT is desirable, as has been previously indicated, to select men with sufficient education so they may progress to those jobs where their education is needed as a background for their work. At the time of employment the matter of further night school education should be discussed with all applicants. No salesman can afford to take the position that his education is complete.

Keeping the Utility Customer Sold

"In all the steps of selection and training it is important to develop in the salesman a philosophy of customer approach which leads him to present his sales story in terms of profit to the customer from the greater use of the product he is selling. He must recognize that utilities are in business 'for keeps' and only those sales resulting in customer satisfaction can pave the way for further sales in the future."

Regardless of care and selection, every new salesman should be on a probationary or trial period for from six to nine months in order that his work may be observed, in the field, by his supervisor. During this trial period a definite training program is essential. This training generally falls into three classifications:

1. Field training in the presence of the customer, accompanied by an experienced salesman or supervisor, in order that he may learn the best methods of approach and customer contact.
2. Assigned individual study on the fundamentals of the production and distribution of electricity and gas, company policies and practices, including rates, and the multiplicity of equipment and applications using electricity and gas.
3. Group meetings at which supervisors or manufacturers' representatives present pertinent sales facts on specific equipment.

In utility sales work, because of the continuous development of new applications and processes, training must be a more or less continuous operation. The best salesman is almost literally "learning something new every day."

In all the steps of selection and training it is important to develop in the salesman a philosophy of customer approach which leads him to present his sales story in terms of profit to the customer from the greater use of the product he is selling. He must recognize that utilities are in business "for keeps" and only those sales resulting in customer satisfaction can pave the way for further sales in the future.

Operation of the Sales Department

One of the questions which any sales manager worth his salt should ask himself from time to time is this:

"What makes a sales organization click?"

What is the best way to encourage and develop that spirit within an or-

ganization which reflects happiness in the job, as well as a desire on the part of each individual to devote his best efforts to the work at hand? Such a spirit is the antithesis of "just getting by." It is something that cannot be forced. Least of all can it result from pressure from the top, or fear of loss of employment if certain predetermined results are not attained. It is our firm conviction that in those cases where the salesman really *wants* to do his best, the maximum potential of new business is almost certain to be attained.

JUST what is it that makes a man give his best to his job? Basically, of course, there is the need to provide for himself and for his family, and to attain economic security; but even deeper than that, most people, if given an opportunity, will strive to succeed in their chosen field. Some of the factors which are important in developing this spirit are:

(a) Pride of accomplishment.
(b) An opportunity to learn and prepare for the job ahead.
(c) A clearly defined line of advancement.
(d) Recognition for a job well done.
(e) Scrupulously fair treatment on promotions.
(f) Informing employees of opportunities for advancement in other companies, as these come to our attention.
(g) Mutual understanding and confidence between salesman and supervisor.
(h) The personal touch.
(i) Campaigns and contests to develop the competitive spirit, coupled with a continuous wage incentive program.
(j) Periodic review of individual performance, and a consistent wage progression program.

MOST of the above points would seem to be self-explanatory, but perhaps a word about "the personal touch" is in order. By this we mean taking a genuine interest in the salesman and his family as individuals for whom we have a real friendship. It may seem a little thing to know the salesman by his first name, but it may mean a lot to him. Perhaps we should remember his birthday. There are many other small ways in which supervision can help the salesman feel he is a member of the team — that he belongs.

These ways must reflect the personality and sincerity of the individual supervisor.

Contests and a continuous wage incentive plan are also important. While the extent to which they can be used varies in different markets, and could well be the subject of a paper in itself, there is no market, including the industrial, to which this type of payment for results obtained cannot be applied to some extent—and the better salesman wants this opportunity to benefit directly from his own efforts.

Working with Other Departments

THE basic responsibility of any utility sales organization is to build load—to promote greater use of its company's product. At the same time it must not lose sight of the fact that the work of all departments contributes to this end result. Salesmen and sales supervision should realize that the work of the engineering and operating departments in constantly improving efficiencies and lowering costs means, in periods when inflation is not an important factor, that rates can be reduced from time to time to the point

where the utility's products are kept in a competitive position with other services, thus making them even more attractive to the customer. Such a competitive price situation is of great help to the sales department, not only in building new load, but in retaining existing business.

Similarly, such departments as accounting and customer relations can pave the way for the salesman. People like to do business with a company in which they have confidence. A customer who is friendly to the company is an open door to the salesman.

Recognizing that the men and women in other departments are actually sales allies results in a mutual understanding and respect for the work these other departments are doing. In addition, an even further understanding might well result from some planned program of interchange of personnel between sales and other departments on the supervisory level, which would seem to be entirely possible in utility work, since many sales department supervisors have an engineering education and background.

Summary

In summary we believe the following points are worthy of emphasis as a "Philosophy of Sales Management" in the utility field, which we sincerely believe will help to build a strong and effective sales organization, recognizing the challenge of its responsibility for load building in all phases of the market:

1. Although forms, procedures, office equipment, sales tools, etc., are all necessary parts of the operation of a utility sales department, they are relatively unimportant in comparison with the men and women who have the responsibility for carrying out the day-to-day work of the organization.

2. Because people are all-important, time spent in careful selection and patient training, both through meetings and in the field, is the best possible investment for the future.

3. An effort should be made to fit the employee into that phase of sales work for which by education, training, and temperament he is best qualified.

4. It is the responsibility of supervision to treat each employee as an individual—to encourage suggestions—to recognize outstanding performance —and to develop an organization along vertical lines, so that the path of progress is clearly defined and individuals with ability and initiative may have the opportunity to prepare themselves for the job ahead.

5. Pressure should be from the bottom up rather than from the top down. In the ideal sales organization each supervisor should feel that he is being pushed by the men in his group to do the best possible job, and he should consider it a part of his job to train his men for greater responsibility, when and if he has an opportunity to move up the line.

6. A sales organization can and should work in close co-operation and harmony with other departments, with mutual respect for the part played by each group in the over-all successful operation of the company. It is the responsibility of sales supervision to show by example that it believes in and encourages this attitude and approach to all interdepartmental problems and to those points of friction which are bound to arise from time to time in any large organization.

All in all, and it will bear repetition, because much is expected of him and his contribution to the growth and development of his company is vital, *the utility salesman is a VIP.*

Washington and the Utilities

Western Public Power Rules

INTERIOR Secretary McKay announced recently a plan to govern disposal of federally generated power in the western division of the Missouri river basin. The "criteria which will guide future contract negotiations" for sale of government power in that part of the basin located in Colorado, Wyoming, and western Nebraska include provisions for 20-year contracts with customers, public or private.

Under the plan, preference customers will get first call, but all power is to be disposed of within a reasonable distance from the point of generation. The criteria cover power supply, marketing area, contracting, and adjustment in rates. It was drafted by Reclamation Commissioner W. A. Dexheimer and approved by Assistant Interior Secretary Fred G. Aandahl.

Apparently the Interior Department is trying to get out of the rate regulation business. Such is the indication of the new standard contract provision as to rates. It is a departure from previous insistence of the Interior Department on supervising all rates for resale of power by wholesale purchasers, both public and private. Henceforth the contract limitations will only require that "savings" be passed on by private company wholesale distributors, whose rates will otherwise be left for the state commissions and local authorities to regulate. Public retail agencies will not even be required to pass on savings. The new contract standards, which carry out the broad policy provisions announced last August by Secretary McKay, are expected to be extended to other areas.

The criteria fit in "very well with the power policy announced in August by Secretary McKay," Aandahl said. He emphasized that the contracts would make it the customers' responsibility to have or obtain other sources of power to meet their needs in excess of amounts stipulated in contracts with the Reclamation Bureau.

AANDAHL said a minimum of steam-generated power will be purchased in low-water years to provide "firm power equivalent to average capacity of the river." He expected an announcement will be made of practically identical procedures to cover power contract negotiations in the eastern division of the Missouri river basin, plus a delineation of initial and subsequent marketing areas.

All power now being produced is being marketed under existing contracts and the criteria will govern new contracts and renegotiation of existing contracts.

The Reclamation Bureau will shortly announce the amount of power expected to become available soon from new hydroelectric plants and for ninety days thereafter will receive applications for contracts. Under the new procedures the bureau will commit itself to deliver specified amounts of firm power throughout the lifetime of new contracts, with no provisions for withdrawal of any part of such power for service to other existing or potential customers. Public bodies given a preference in sale of Federal power by law will get the first call on any power available for sale, but there will be no reservation of supplies for them to meet future load growths.

MEANWHILE, leaders of two of the nation's largest farm organizations endorsed the Eisenhower administration's power policy, but a third vigorously denounced it. Approval was voiced by President Allan B. Kline of the American Farm Bureau Federation and Herschel D. Newsom, master of the National Grange. But President James G. Patton of the National Farmers Union called it "a total surrender to the electric company lobby."

The new policy, as enunciated by Secretary of Interior McKay, defines a narrow Federal rôle in power development and puts "primary responsibility" for supplying power needs in the hands of local private and public interests.

FPC and the Gas Utilities

CHAIRMAN Kuykendall of the Federal Power Commission walked into an unexpectedly lively session when he undertook to address the National Institute of Municipal Law Officers at the Mayflower Hotel in Washington, D. C., on September 15th. He had prepared a polite, simple, and informative speech about the commission's work.

He asked for the co-operation of the municipal law officers and said that the FPC, in turn, would co-operate in local rate matters as much as it could. He referred to activity in previous years of the FPC in co-operating with municipal and state regulatory agencies in gas and electric rate cases before the state commissions. He said the FPC would continue to give cities such assistance and co-operation for modest consideration—which is required by law in such cases.

Then he referred to the new rules for presenting gas rate cases, adopted last July, and the impact of inflation on the continued heavy load of natural gas rate cases before the FPC. Chairman Kuykendall had followed, on the speakers' stand, his brother commissioner and Eisenhower appointee on the FCC—former Wisconsin commission chairman, John C. Doerfer.

But when the main part of his speech was over, there were some questions from the floor which indicated that all was not harmonious within the ranks of the municipal law officers with respect to the pending legislation for limiting FPC jurisdiction over natural gas distributing utilities, importing out-of-state supplies.

This is the so-called Hinshaw Bill (HR 5976), which was supported not only by the FPC but also by the National Association of Railroad and Utilities Commissioners and various others. There was also some understanding that it would not be opposed by the National Institute of Municipal Law Officers. But apparently there has been some reversal of this sentiment. Anyhow, the next day the association passed a resolution condemning such legislation.

It is not clear just what this will amount to in view of the fact that the bill has been favorably reported by the Senate. It is now on the Senate docket. Under the circumstances, the position of the municipal law officers will be, at best, an arguing point from the floor, because testimony has been completed in committee.

Under the able and influential guidance of the chairman of the Senate Interstate Commerce Committee, Senator Bricker (Republican, Ohio), it looks as if the Hinshaw Bill should make the grade early in the next session under its own momentum. The bill is primarily designed to avoid the expense and duplication of state and Federal regulation which followed the Supreme Court decision in the East Ohio Gas Case.

The Phillips Case Again

LOOKING at the other end of the pipeline, however, it seems less likely that Congress will act to relieve the FPC of its jurisdiction over independent gas producers. The reason for this is twofold. First, there is the natural political complication of a forthcoming congressional election year. There has been a

good deal of left-wing agitation, allegedly on behalf of the consumer. Antiadministration columnists have been pounding away at the "give-away" theme. So, the Congressmen, by and large, may be disposed to do nothing about this for the present.

That brings up the second reason for delay, one which is always a good excuse —pendency of a court appeal. The Department of Justice has until October 19th to file a request for review of the decision of the U. S. Circuit Court of Appeals for the District of Columbia that the FPC must take jurisdiction over the field price of natural gas. FPC tried to bow out of this field voluntarily. Other independent producers and gatherers are looking to the Supreme Court's expected review to settle the question. Texas, Oklahoma, and New Mexico have filed briefs supporting the Phillips petition, contending that FPC control would jeopardize exploration and development of new natural gas sources. Final decision by the court may not come until next spring, when it is too late for the 83rd Congress to get started.

On September 15th, representatives of the natural gas industry met in Washington, D. C., with members of the FPC to discuss the feasibility of a gas industry advisory group. FPC Chairman Kuykendall called a meeting of twelve industry leaders in response to suggestions for the formation of a council that would study the various regulatory problems facing FPC and the industry. Although the conference was not expected to get much beyond the exploratory stage, observers saw in the commission's action new evidence of a desire of the administration for closer co-operation between industry and the government.

FPC Decision Heartens Phone Official

A Pacific Telephone & Telegraph Company official has expressed encouragement over a recent decision of the Federal Power Commission which seemed to indicate a more favorable attitude on the part of the commission with respect to rate making in the natural gas industry.

The reference was to the latest rate-making decision of the FPC, in which it granted a 6¼ per cent return on net property to a subsidiary of the Columbia Gas System.

In a letter to the financial editor of the *Los Angeles Times,* Lawrence T. Cooper, assistant vice president of Pacific Tel. & Tel., said the FPC's decision underscored the necessity of adequate earning power to support expanding new capital needs, a philosophy which he hoped would be applied by the California Public Utilities Commission in its decision on his company's pending petition for higher rates.

Pacific Tel. & Tel.'s request for rate relief was filed with the California commission in December, 1952. Cross-examination of the company's witnesses is scheduled for December of this year. If precedent is followed, the commission's staff will present its testimony and, after cross-examination of its witnesses, an order from the commission will be forthcoming. "This is a long time as compared to average handling throughout the country," Cooper wrote, "but primarily we are concerned in getting a fair order much more than we are concerned over the problem of delay, even though that is a very serious problem for us."

Cooper said the problem of his company is almost identical to that which plagues the natural gas industry; namely, the problem of raising very large amounts of additional capital in order to take care of expanding needs. Pacific Tel. & Tel.'s business has doubled since the end of World War II and is still growing rapidly, Cooper stated. "We are planning to issue $50,000,000 in debentures early this fall and we shall have to raise another $100,000,000 next spring, both of these issues to pay off temporary bank loans with which we are financing expansion," Cooper explained.

Financial News and Comment

By OWEN ELY

Dow Theory Upsets Stock Market

THE year 1953 has been a deflationary period in the security markets. The Dow-Jones industrial average recorded its high for the 1942-52 bull market on January 8th, at 293.79, having gained about 30 points in the postelection rally. The average remained in about a 10-point range for several months, but by June had dropped back to the pre-election level around 263. A brief summer rally carried it to 275, from which it declined (as of September 14th close) to about 255. The rail average, which behaved very well up to August, dropped rather sharply. The position was then as shown in table on page 498.

This year's "post-Korean" decline is considerably smaller than the postwar decline of 1946 when the Dow industrial average dropped 23 per cent in seven months. Some of the recent selling in stocks resulted from "psychological" factors, such as the bear market "signal" for Dow theory addicts; and margin selling, the first in several years, also had a temporarily aggravating effect. The market has as of September 18th rallied moderately, and some observers feel that the lows for the year have been made. Whether this forecast proves true will doubtless depend on the outlook for business during 1953-54.

DEPARTMENT INDEX

UTILITY stocks have acted much better in the recent decline than they did in the spring down trend; recent prices have been about the same as the July lows. The utilities have probably been bolstered somewhat by (1) absence of the heavy volume of new offerings which aggravated the spring decline (there was practically no stock financing in August, and the amount indicated for September appears moderate); (2) the bond market has not declined sharply as it did in the spring, and there has been less talk recently about switching from utility commons to bonds and preferred stocks; (3) the new record electric output figures, which are unusual in the summer, and apparently due to heavy use of air conditioners during the heat waves; and (4) the continued announcement of dividend increases. There has probably been some switching from industrial to utility stocks as more "defensive" against any severe down trend in the business cycle. Continued buying

of utility stocks by pension and other funds may also be a factor.

The recent selling wave in industrials and rails seems to have been initiated by fears of a sharp setback in the heavy industries which might result from cancellations of defense orders, and reduced buying by consumers, due to an oversupply of cars, new houses, etc. But the recent slippage of some 12 points in steel activity (from 102 per cent to 90 per cent) was probably due both to summer letdowns and to the $70,000,000 factory fire which has temporarily upset General Motors' operations. There are some indications of a moderate rally in steel activity, and the year 1953 as a whole is expected to make a new record for output.

SUMMARIZING, the decline in stocks appears due to the following factors: (1) the spring decline in the bond market with resultant wiping out of some institutional book reserves (theoretically, not actually); (2) the administration's delay in checking the sharp rise in interest rates, and in readjusting bank reserves; (3) the declining trend of farm prices and income, and fears that the parity system of protecting the farmers might be abandoned; (4) the broad deflationary policies of the new administration and particularly the cutbacks in defense orders—despite the fact that these will have little near-term effect on business activity; (5) the continued increase in inventories and loans (manufacturers' inventories are about 5 per cent over last year); (6) some recent easing of retail sales gains over last year, probably due largely to the severe heat wave; (7) and the slight dip in the business indexes, partially due to the General Motors fire, together with headline news of small and scattered layoffs.

THERE are plenty of statistics to support the bullish side of the argument, though necessarily most of these reflect past conditions and are less significant for the future: (1) The common stocks composing the Dow-Jones industrial average now yield about 6 per cent, or double that of early 1929; (2) the FRB index made a better average showing in the first half of this year than in the same period of last year (240 *versus* 232), and the second-quarter output of goods and services gained 8 per cent over last year; (3) corporate income for the nation's manufacturers are expected to make the second best showing this year (below that of 1950, but better than 1952); (4) employment in August was 63,400,000, a new high, and unemployment was at a postwar low; (5) profits of many companies should be automatically increased next year by elimination of EPT, and consumer spending power should be moderately increased by the anticipated readjustment of the personal income tax rate in April; (6) business borrowing from New York banks made a record weekly gain of $175,000,000 in the week ended September 16th; (7) despite slackening of starts on new houses, new construction of all kinds in August set a new record, up 7 per cent from last year; (8) while home building has probably been overdone temporarily, it is favored by the current very rapid increase in population (quite different from conditions in the 1930's); (9) there is still an immense amount of road building (facilitated by toll financing for

	Dow-Jones Averages		
	Industrials	*Rails*	*Utilities*
1952 Range—High	292	113	53
—Low	256	82	48
1953 Range—High	294	112	54
—Low*	255	91	48
September 14, 1953	255	91	49
Per Cent Decline from 1952-53 Highs	13%	19%	9%

*To September 14th.

turnpikes), together with utility construction, much commercial building (just getting under way) together with schools, hospitals, and much-needed slum projects; (10) industry plans to spend nearly $28 billion this year for construction, or 5 per cent more than last year; (11) while some electrical appliances are getting hard to sell, this may be balanced by the big demand for air

CURRENT ELECTRIC UTILITY STATISTICS AND RATIOS

	Unit	Latest Month	Latest 12 Mos.	Per Cent Increase Latest Month	Per Cent Increase Latest 12 Mos.
Operating Statistics (July)					
Output KWH—Total	Bill. KWH	38.0	426.6	17%	10%
Hydro-generated	"	8.8	—	—	—
Steam-generated	"	29.2	—	24	—
Capacity	Mill. KW	86.1	—	—	10
Peak Load (May)	"	70.7	—	12	—
Fuel Use: Coal	Mill. Tons	9.6	—	21	—
Gas	Mill. MCF	109.3	—	10	—
Oil	Mill. Bbls.	6.3	—	45	—
Coal Stocks	Mill. Tons	43.4	—	6	—
Customers, Sales, Revenues, and Plant (June)					
KWH Sales—Residential	Bill. KWH	5.4	67	13%	12%
Commercial	"	4.4	51	9	9
Industrial	"	13.0	148	21	8
Total, Incl. Misc.	"	29.5	348	15	8
Customers—Residential	Mill.	31.6	—	4	4
Commercial	"	4.5	—	2	2
Industrial	"	.5	—	2	2
Total, Incl. Others	"	38.9	—	3	3
Income Account—Summary (June)					
Revenues—Residential	Bill. $	156	1,917	12%	12%
Commercial	"	116	1,367	9	9
Industrial	"	146	1,661	17	9
Total, Inc. Misc. Sales	"	462	5,437	12	10
Sales to Other Utilities	"	34	422	13	9
Misc. Income	"	14	215	4	4
Expenditures—Fuel	"	82	970	21	11
Labor	"	96	1,110	8	7
Misc. Expenses	"	75	877	12	10
Depreciation	"	46	529	12	8
Taxes	"	106	1,279	11	7
Interest	"	29	329	12	12
Amortization, etc.	"	—	—	NC	NC
Net Income	"	78	984	10	14
Pref. Div. (Est.)	"	12	138	8	8
Bal. for Common Stk. (Est.)	"	66	846	12	17
Com. Div. (Est.)	"	52	618	8	8
Bal. to Sur. (Est.)	"	14	228	100	115
Electric Utility Plant (June)	"	24,064	—	11	—
Reserve for Deprec. and Amort.	"	4,741	—	7	—
Net Electric Utility Plant	"	19,323	—	12	—
Life Insurance Investments (January 1st-September 5th)					
Utility Bonds	"	—	485	—	2%
Utility Stocks	"	—	65	—	23
% of All Investments	"	—	8%	—	7

D—Decrease. NC—Not comparable.

conditioners, driers, etc., together with the future demand for the heat pump, now getting into commercial production; (12) new automobile models, with new devices such as power-steering and air-conditioning, should help maintain demand at levels not too far below the top.

A TECHNICAL factor of considerable importance is the much improved showing of the bond market. It had been feared that the market for new issues would be swamped by the heavy accumulation of September offerings, which included $150,000,000 bonds of General Motors Acceptance, $125,000,000 New York State Thruway, $50,000,000 Pacific Tel & Tel, $35,000,000 each for Westinghouse Airbrake and Duke Power, and $20,000,000 for Tennessee Gas Transmission. In general, this big volume of new business has been well absorbed, with the recent General Motors Acceptance debentures "going out of the window," with a current premium over the issue price.

The stock market has apparently given little weight as yet to the improved international situation, including (1) the substantial victory of Chancellor Adenauer in the west German election; (2) waning of the French strikes and the determined effort of the new Premier to collect income taxes and straighten out the fiscal picture; (3) recent reduction of the official discount rates by both Britain and France, presumably to stimulate foreign trade; and (4) the setback to Bolshevik ambitions due to difficulties in Germany and in the satellites, together with continuing shifts in the top political setup.

The EEI Statistical Bulletin For 1952

THE annual *Statistical Bulletin* of the Edison Electric Institute for 1952 has appeared a little belatedly, but with an improved format and new charts and tables which add considerably to its value. Several of these charts are reproduced in this department.

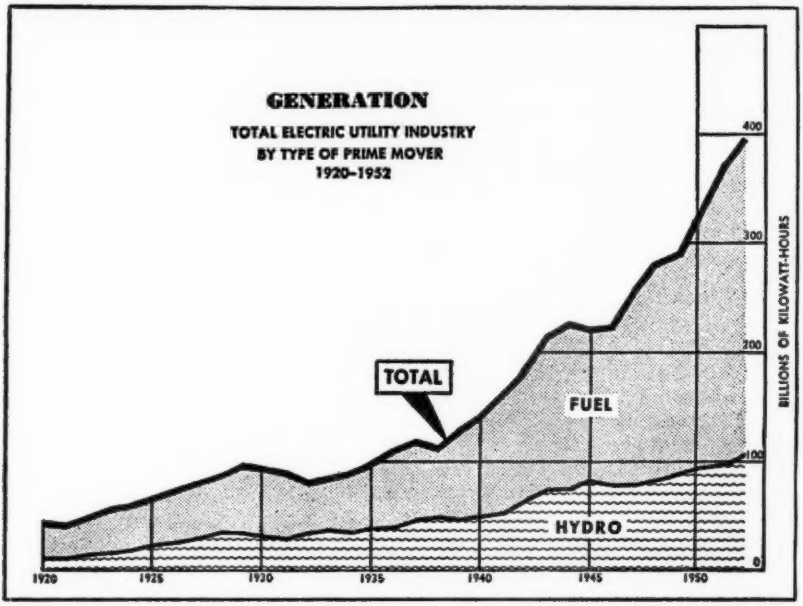
Following are some comments on the *Bulletin:*

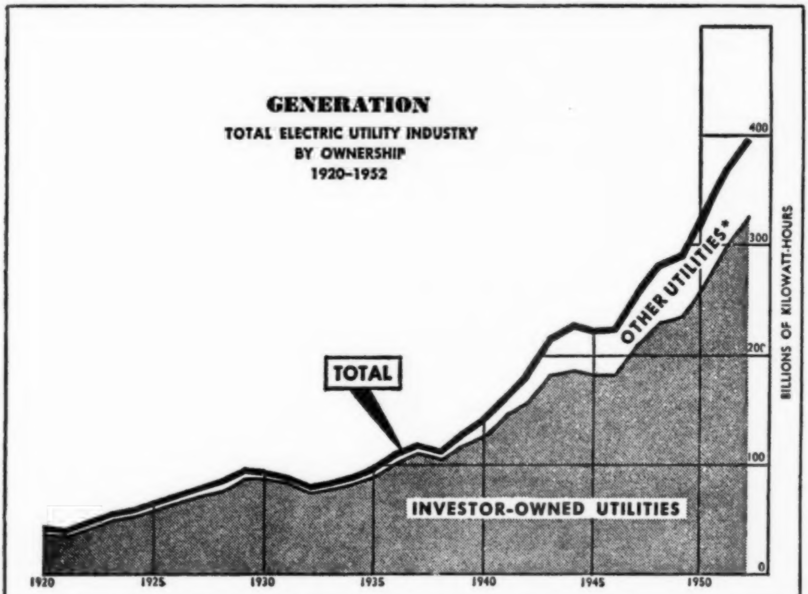
The first chart, on page VI, shows the "United States Sources of Electric Generation by Types of Ownership"; this could have been improved by adding the percentages from each source, rather than merely showing the formal relationships, though the figures are obtainable on page 13. "Co-operatives" are made a special group between "investor-owned" and "government-owned"; this classification seems a little artificial since most co-ops have been heavily subsidized or promoted by government agencies, and it would seem more logical to include them in the government division. It would also seem worth while to subdivide the item, "power districts, state projects," although it is true that they are closely related. It would also seem worth while to include, in the tables on generating capacity and generation, the figures for industrial power plants, railroads, etc., so as to get a complete total for all industry.

A NEW table (page 52) shows public utility long-term financing by years, type of issue, purpose and type of utility for the period 1948-52; these figures are compiled by Ebasco Services and the current data are reproduced in this department occasionally. It is valuable to have the figures for a period of years to show comparative trends. For example, it is rather surprising to note that the electric utilities did less aggregate financing last year than in 1949 or 1950, although this is accounted for by the fact that refunding and divestment financing have now dropped to a negligible amount, compared with very substantial figures in 1949-50.

The weighted average yields on *newly* issued domestic bonds and preferred stocks (reproduced from Moody's Investment Service) for the years 1944-52 are also of interest, as well as the average yields of outstanding utility bonds, preferred stocks, and common stocks (classified as to quality) by quarters for 1946-52.

The composite balance sheet statistics





*Cooperative-Owned and Government-Owned Utilities

From Edison Electric Institute Bulletin

(page 48) are now presented for a longer period of years than formerly, but unfortunately the years 1929-36 have been dropped from the combined income statement for investor-owned electric utilities (page 47).

TABLE 10 on page 15, showing the *percentages* of total kilowatt-hour generation since 1920 for utility *versus* government-owned projects, subdivided between hydro, steam, and internal combustion, is a valuable addition. It is interesting to note that public agencies now control over 7 per cent of all steam generation, while in hydro generation investors and public agencies split the output about fifty-fifty. (In 1933, when the New Deal began its program, public agencies had less than 9 per cent of hydro generation and only 6 per cent of all generation.)

Table 9 on page 14 also appears to be new, "Generation Per Kilowatt of Installed Capacity," by ownership and type of prime mover. Thus it is interesting to note that investor-owned utilities used each kilowatt of name-plate steam capacity in 1952 to produce 5,199 kilowatt hours compared with a potential maximum of 8,760 (365 days times twenty-four hours), or a use ratio of 59 per cent. On the other hand, the use made of steam capacity owned by government agencies was only 44 per cent, and for co-operatives 45 per cent.

Tables 5 and 6 on page 8 give dependable capacity and annual peak loads for only the years 1940-52, whereas the previous *Bulletin* gave data back to 1925; it would seem worth while to maintain these tables on a complete historical basis, otherwise the analyst must look up old *Bulletins* and piece the data together.

The small chart which appeared on page 7 of last year's *Bulletin*, showing total capacity divided between peak-load requirements and reserve capacity, does not appear in this year's *Bulletin*—possibly because of the controversial nature of these statistics. On page 37 of this year's *Bulletin* there is a brief but interesting discussion of "Peaks and Load Factor," which points out that "noncoincident peak load" is not a true peak.

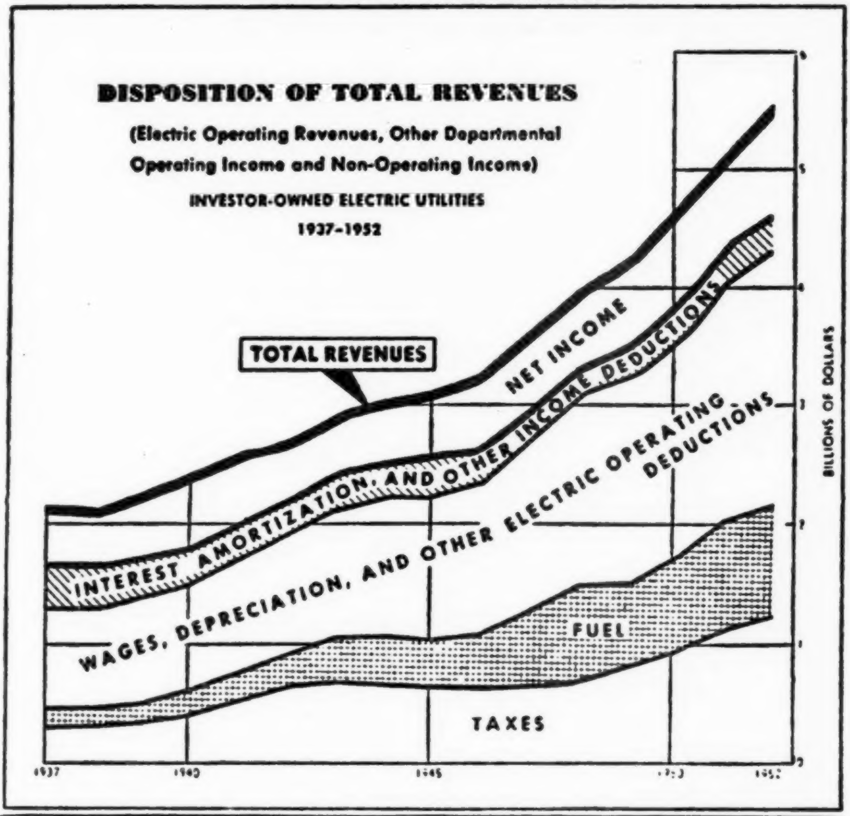
THE *Bulletin* appears to avoid the statistical issue over "capacity" *versus* "capability." (See the article by Hendrik A. Diamant in PUBLIC UTILITIES FORTNIGHTLY,[1] also comment in this department at various times.) The capacity figures presented in Tables 2-4 are still on the outmoded "name-plate" basis, while Table 5 uses the FPC figures for "dependable capacity." This is defined in a footnote as "capacity of fuel generating plants that can be relied upon for active or stand-by service, plus capability of hydro plants under most adverse water conditions, and plus net firm purchases—all at the usual time of the annual system peak."

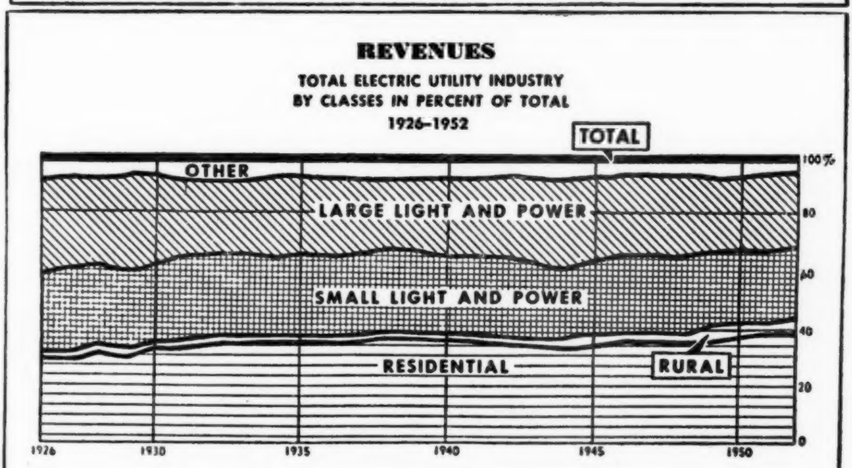
This does not clear up the question as to whether the FPC has failed to credit total steam capacity with the 10-20 per cent excess capability of *modern* steam plants over their name-plate ratings. This obscure point might well be discussed in the text. The question also arises as to why the EEI does not reproduce in the *Bulletin* some of the valuable statistics on present capacity *versus* peak load (with estimated projections for future years) which are compiled and published from time to time by its special committee concerned with the industry's construction program.

The 1951 *Bulletin* (page 5) contained a chart showing total generation electricity for war and defense purposes *versus* "normal" civilian use. It seems regrettable that this was dropped in the new *Bulletin*. The new issue does, however, give an excellent chart covering electric construction expenditures for investor-owned utilities for 1925-52. This might well be "projected" for several years ahead on the basis of data previously published by the institute.

The *Bulletin* has been improved by the addition of an index, but no tabulation appears listing the new charts.

[1] "Rated *versus* Actual Capacity for Power Production." Vol. XLIX, No. 2, January 17, 1952, page 79.


DISPOSITION OF TOTAL REVENUES
(Electric Operating Revenues, Other Departmental Operating Income and Non-Operating Income)
INVESTOR-OWNED ELECTRIC UTILITIES
1937-1952
TOTAL REVENUES
NET INCOME
INTEREST AMORTIZATION, AND OTHER INCOME DEDUCTIONS
WAGES, DEPRECIATION, AND OTHER ELECTRIC OPERATING DEDUCTIONS
FUEL
TAXES
BILLIONS OF DOLLARS
1937
1940
1945
1952


REVENUES
TOTAL ELECTRIC UTILITY INDUSTRY
BY CLASSES IN PERCENT OF TOTAL
1926-1952
TOTAL
OTHER
LARGE LIGHT AND POWER
SMALL LIGHT AND POWER
RESIDENTIAL
RURAL
100%
80
60
40
20
0
1926
1930
1935
1940
1945
1950

RECENT FINANCIAL DATA ON GAS COMPANY STOCKS

1952 Rev. (Mill.)			9/15/53 Price About	Dividend Rate	Approx. Yield	—Share Earnings*— Current Period	% Increase	12 Mos. Ended	Price-Earn. Ratio	Div. Payout
		Pipelines								
$ 9	O	East Tennessee Nat. Gas	7	—	—	$ .60	40%	June	11.7	—
34	S	Mississippi River Fuel	35	$2.20	6.3%	3.00	35	June	11.7	73%
52	S	Southern Natural Gas	24	1.40	5.8	2.13	D1	June	11.3	66
104	O	Tenn. Gas Trans.	22	1.40	6.4	1.73	42	June	12.7	81
94	O	Texas East. Trans.	16	1.00	6.3	1.11	NC	June	14.4	90
47	O	Texas Gas Trans.	16	1.00	6.3	1.42	8	June	11.3	70
52	O	Transcontinental Gas	21	1.40	6.7	1.56	21	June	13.5	90
		Averages			6.3%				12.4	
		Integrated Companies								
102	S	American Natural Gas	34	$2.00	5.9%	$3.33	33%	June	10.2	60%
17	O	Colorado Interstate Gas	30	1.25	4.2	1.39	NC	July	—	90
204	S	Columbia Gas System	13	.90	6.9	.82**	D9	June	15.9	110
9	O	Commonwealth Gas	12	(a)	4.0a	.41	D53	Dec.	—	—
8	A	Consol. Gas Util.	12	.75	6.3	1.07	D25	July	11.2	75
174	S	Consol. Nat. Gas	52	2.50	4.8	3.79	D21	June	13.7	66
78	S	El Paso Nat. Gas	31	1.60	5.2	2.77	23	July	11.2	58
29	S	Equitable Gas	21	1.30	6.2	2.05	9	June	10.2	63
17	O	Interstate Nat. Gas	45	2.50	5.6	3.13	D4	Dec.	14.4	80
10	O	Kansas-Neb. Nat. Gas	22	1.12	5.1	1.64	D15	Dec.	13.4	68
63	S	Lone Star Gas	23	1.40	6.1	1.75	11	June	13.1	80
18	S	Montana-Dakota Utilities	18	.90	5.0	.84	2	June	—	107
13	O	Mountain Fuel Supply	18	1.00	5.6	1.25	NC	Apr.	14.4	64
46	A	National Fuel Gas	14	1.00	7.1	1.24	D4	June	11.3	69
3	O	National Gas & Oil	7	.60	8.6	.60	D32	Mar.	11.7	100
47	S	Northern Nat. Gas	35	1.80	5.1	2.51	9	June	13.9	72
30	A	Oklahoma Nat. Gas	19	1.20	6.3	1.27**	D5	July	15.0	94
21	A	Pacific Pub. Serv.	19	1.00	5.3	1.69	15	Dec.	11.2	59
92	S	Panhandle East. P. L.	65	2.50#	3.8	5.05	36	June	12.9	50
8	O	Pennsylvania Gas	16	.80	5.0	1.79	D1	Dec.	8.9	45
123	S	Peoples Gas Lt. & Coke	128	6.00	4.7	9.37	15	June	13.7	64
21	O	Southern Union Gas	21	.80	3.8	1.18	11	Dec.	17.8	68
159	S	United Gas Corp.	25	1.25	5.0	2.05	47	June	12.2	61
		Averages			5.4%				12.7	
		Retail Distributors								
18	A	Alabama Gas	15	$ .80	5.3%	$1.28	7%	June	11.7	63%
28	O	Atlanta Gas Light	21	1.20	5.7	1.81	12	June	11.6	66
44	S	Brooklyn Union Gas	23	1.50	6.5	1.45	D41	June	15.9	103
25	O	Central Elec. & Gas	11½	.80	7.0	.97**	D4	July	11.9	82
6	O	Hartford Gas	35	2.00	5.7	2.07	D13	Dec.	16.9	97
11	O	Houston Natural Gas	20	.85	4.3	1.32	D11	July	15.2	61
10	O	Indiana Gas & Water	23	1.40	6.1	1.87	D8	Apr.	12.3	75
5	A	Kings County Lighting	10	.70	7.0	.99	11	June	10.1	71
30	S	Laclede Gas	8	.50	6.3	.95	D8	June	8.4	53
24	O	Minneapolis Gas	22	1.15	5.2	1.44**	9	June	15.3	80
6	O	Mississippi Valley Gas	19	1.00	5.3	2.11	NC	June	9.0	47
7	O	Mobile Gas Service	16	.90	5.6	1.93	21	June	8.3	47
6	O	New Haven Gas Light	27	1.60	5.9	1.43	D7	Dec.	18.9	112
139	S	Pacific Lighting	64	3.00	4.7	5.20	29	June	12.3	58
12	O	Portland Gas & Coke	17	.90	5.3	1.70	D8	June	10.0	53
7	A	Providence Gas	8½	.32	3.8	.34	D6	Dec.	—	94
5	O	Seattle Gas	17	.80	4.7	1.22	3	June	13.9	66
6	O	South Jersey Gas	16	1.00	6.3	1.23	22	June	13.0	81
5	O	Springfield Gas Light	29	1.80	6.2	1.93	18	Dec.	15.0	93
21	S	United Gas Improvement	31	1.80	5.8	2.36	16	June	13.1	76
31	S	Washington Gas Light	30	1.80	6.0	2.23	17	June	13.5	81
		Averages			5.5%				12.8	
		Canadian								
15	S	International Utilities	26	$1.40	5.4%	$1.89	D2%	June	13.8	74%

RECENT FINANCIAL DATA ON TELEPHONE, TRANSIT, AND WATER COMPANIES

1952 Rev. (Mill.)			9/15/53 Price About	Dividend Rate	Approx. Yield	Share Earnings* Current Period	Share Earnings* % Increase	Share Earnings* 12 Mos. Ended	Price-Earn. Ratio	Div. Payout
		Communications Companies								
		Bell System								
$4,040	S	Am. Tel. & Tel. (Cons.)	153	$9.00	5.9%	$11.46**	D1%	Feb.	13.4	79%
185	A	Bell Tel. of Canada ...	33	2.00	6.1	2.35	40	Dec.	14.0	85
29	O	Cin. & Sub. Bell Tel. ..	75	4.50	6.0	4.61	1	Dec.	16.3	98
127	A	Mountain States T. & T.	100	6.00	6.0	7.09	80	June	14.1	85
220	A	New Eng. Tel. & Tel. .	111	8.00	7.2	7.50	7	June	14.8	107
536	S	Pacific Tel. & Tel.	111	7.00	6.3	7.77**	D2	May	14.3	90
68	O	So. New England Tel. .	34	1.80	5.3	1.93	26	Dec.	17.6	93
		Averages			6.1%				14.9	
		Independents								
10	O	Central Telephone	14	$ .90	6.4%	$1.58	35%	July	8.9	57%
2	O	Florida Telephone	12	.80	6.7	.99	1	Dec.	12.1	81
101	S	General Telephone	38	2.20	5.8	3.65	69	July	10.4	60
4	O	Inter-Mountain Tel. ...	12	.80	6.7	.88	31	Dec.	13.6	91
12	S	Peninsular Telephone ..	27	1.60	5.9	2.03	24	June	13.3	79
15	O	Rochester Telephone ..	15	.80	5.3	1.55	7	June	9.7	52
2	O	Southeastern Telephone	12	.80	6.7	1.18	79	Dec.	10.2	68
6	O	Southwest. States Tel. .	17	1.00	5.9	1.72	41	June	9.9	58
28	O	Telephone B. & S.	13	—	—	1.11	1	Dec.	11.7	—
15	O	United Utilities	15	1.00	6.7	1.05	NC	Apr.	14.3	95
195	S	Western Union Tel. ...	42	3.00	7.1	1.04	D79	Dec.	—	288
		Averages			6.3%				11.4	
		Transit Companies								
29	A	Capital Transit	13	$1.60	12.3%	$1.26	15%	May	10.3	127%
9	O	Dallas Ry. & Terminal .	12	1.40	11.7	2.32	D6	Dec.	5.2	60
229	S	Greyhound Corp.	13	1.00	7.7	1.29	1	Mar.	10.1	78
25	O	Los Angeles Transit ...	11	1.00	9.1	1.15	46	Dec.	9.6	87
31	S	National City Lines	17	1.40	8.2	1.86	D3	Dec.	9.1	75
71	O	Philadelphia Transit ...	3½	—	—	Deficit	—	Dec.	—	—
7	O	Rochester Transit	3½	.10	2.9	.26	D77	Dec.	13.5	38
27	O	St. Louis P. S. A	14	1.40	10.0	.91	189	Dec.	15.4	154
17	S	Twin City R. T.	13	1.60	12.3	—	—	Dec.	—	—
24	O	United Transit	3½	—	—	.56	33	Dec.	6.3	—
		Averages			9.3%				9.9	
		Water Companies								
		Holding Companies								
29	S	American Water Works	9	$ .50	5.6%	$1.02	108%	June	8.8	49%
6	O	New York Water Serv.	46	.80	1.7	2.37	25	June	19.4	34
		Operating Companies								
3	O	Bridgeport Hydraulic ..	29	$1.60	5.5%	$1.62	D7%	—	17.9	99%
9	O	California Water Serv.	31	2.00	6.5	2.63	24	June	11.8	76
7	S	Hackensack Water	33	1.70	5.2	2.42	D6	Dec.	13.6	70
4	O	Jamaica Water Supply .	29	1.80	6.2	2.99	13	June	9.7	60
3	O	New Haven Water	56	3.00	5.4	2.76	D5	Dec.	20.3	109
6	O	Phila. & Sub. Water ...	46	1.00	2.2	4.69	—	Dec.	9.8	21
9	O	Scranton-Springbrook .	14	.90	6.4	1.08	D4	Mar.	13.0	83
3	O	Southern Calif. Water .	9	.65	7.2	.87	34	June	10.3	75
3	O	West Va. Water Service	31	1.20	3.9	1.32	7	June	—	91
		Averages			5.6%				13.2	

A—American Exchange. O—Over-counter or out-of-town exchange. S—New York Stock Exchange. D—Decrease. *Earnings are calculated on present number of shares outstanding, except as otherwise indicated. **On average shares outstanding. #—Includes stock dividend. (a)—Paid 4 per cent stock dividend. NC—Not comparable.

The March of Events

In General

NARUC Convention

THE sixty-fifth annual convention of the National Association of Railroad and Utilities Commissioners featured one of the most successful and best attended meetings of that organization in its history. It was held at the Hotel Roosevelt in New York city September 21st through the 24th. A registration of approximately 800, with many more in attendance at the sessions, was noted.

After the usual opening speeches of welcome, the major address at the first afternoon session was that of the retiring president, Eugene S. Loughlin, chairman of the Connecticut commission, who said that the Eisenhower administration, in decentralizing regulatory powers, is giving "every indication" that it would encourage free enterprise in the utility industry. "We now find the Federal government deliberately and measurably returning responsibilities to the states where they have traditionally been lodged," Loughlin stated.

Benjamin F. Feinberg, chairman of the New York commission, told the gathering that its deliberations affected the comfort and economic welfare of every person in this country.

The second session (September 22nd) featured a discussion of atomic energy development. This nation's electric power requirements will tax the supply of conventional low-cost fuels within a quarter-century. Such was the speculation of Dr. William L. Davidson, AEC director of industrial development, in urging the easing of government restrictions on the participation of private capital in the development of atomic energy. He said that relaxing such Federal control is necessary to bring nearer the day when atomic power can be used to light American homes and turn the wheels of industry.

In the morning of the third day the discussion leader was FPC Chairman Jerome K. Kuykendall, who stressed the willingness of FPC to co-operate with the state commissions. "The members of the FPC have worked seriously and diligently with you in an effort to find the best way to define the state and Federal responsibility in the regulation of natural gas companies," he said. He referred to the commission's position on the Hinshaw Bill (HR 5976), which relieved purely intrastate gas distributors from FPC jurisdiction. "Although all members of our commission did not approve the particular language of this bill," he said, "nevertheless we are in complete agreement on the general principle that, in so far as our system of dual government permits, regulatory matters of a local nature should be handled by local regulatory authorities." He offered the services of the FPC staff, when desired by state commissions, subject to FPC's own work load and under the terms expressed in the Natural Gas and Federal Power acts.

The following new officers of the NARUC were elected: Commissioner C. L. "Roy" Doherty of the South Dakota commission, to be president; Chairman W. F. Whitney of the Wisconsin commission, first vice president; Chairman Benjamin F. Feinberg of the New York commission, second vice president; and Austin L. Roberts, Jr., general solicitor. The 1954 meeting of the association will take place in Chicago, November 8th to 12th.

Missouri

Gets Full Rate Increase

UNION ELECTRIC COMPANY OF MISSOURI recently was granted an estimated increase in its Missouri electric rates of $4,393,100, the full amount sought by the company in its revised application, in an order issued by the state public service commission, effective September 28th.

Based upon 1952 operations, this represents an increase of 8.5 per cent. In approving the rise, the commission found the revised schedule filed by the company was reasonable and not excessive. After seeking in its original filing a rise of $5,189,800, the utility revised its request downward.

In its order, which was unanimous, the commission found the utility's rates would not permit it to earn an amount sufficient to pay its operating expenses, maintain its credit, and attract new capital.

New York

Electric Rates Boosted

THE state public service commission last month authorized the Long Island Lighting Company, serving most of Nassau and Suffolk counties and a portion of Queens, to increase by a little more than 3 per cent its electric rate schedule in effect since 1949.

E. W. Doebler, company president, said the increase would produce additional revenue of about $1,450,000 based on 1953 figures, and would come to less than 20 cents a month for the average residential customer. The increase would take effect January 1st.

The commission decision came as a result of the company's application to cancel rate reductions of about 8.2 per cent made in 1948 and 1949. Refusing to sanction restoration of the entire reduction, the commission told the company 5 per cent must remain in effect, but that the balance could be restored.

Pennsylvania

Rate Increase Approved

THE state public utility commission last month allowed the Pennsylvania Power Company, New Castle, to put into effect a $529,000 annual residential rate increase, $118,000 less than it originally sought.

The increase, under suspension for nineteen months since February 26, 1952, will average about 10 per cent for some 63,500 residential electric users in Allegheny, Beaver, Butler, Lawrence, and Mercer counties.

The new rates were expected to become effective at the end of the suspension deadline, September 26th.

Wisconsin

Fare Increase Denied

THE state public service commission recently denied a Transport Company request for an increase in cash fare. The commission ruling granted an increase of 10 cents in the price of all weekly passes. The Milwaukee transit utility had applied for permission to boost weekly passes 25 cents and to raise single cash fares from 15 cents to 20 cents.

The commission said that no boost in cash fares was required to give the company a "fair return." It said that the higher charge for passes was "reasonable and lawful." Passes in the central zone sell at present for $2. Student passes cost 75 cents.

Progress of Regulation

Net Investment Cost Approved for Telephone Company

THE Wyoming commission, although recognizing the fact that it was not required to employ and follow any formula in a rate proceeding, approved net investment cost as a proper rate base for a telephone utility. The proprietor of the company set forth an amount said to represent net investment. This amount was disallowed.

When the proprietor had purchased the company, the commission did not order and prescribe the manner in which the properties should be entered upon the books.

Since the predecessor company did not keep any property records or a record showing the company's accumulated depreciation reserve as of the transfer date, the amount set forth by the proprietor did not represent original depreciation cost, but represented the purchase price of those properties plus additions less depreciation. A rate structure cannot be approved if the rate base does not reflect depreciated original cost, ruled the commission.

In authorizing increased rates, the commission made some adjustments as to operating expenses. An amount representing materials and supplies was allowed as an operating expense although it was not shown whether such amount was used in the construction of new plant or for maintenance of existing plant. The company was directed in the future to charge all amounts expended for materials and supplies that are used in the creation of new plant to its plant account rather than to operating expense.

Furniture and miscellaneous tools were ordered to be charged to plant account rather than to operating expense. That part of the proprietor's salary for work performed on new construction was disallowed as an operating expense and ordered to be charged to plant account. *Re Pinedale Teleph. & Teleg. Co. Docket No. 9231, June 19, 1953.*

Board Not Bound by Rate Base Formula

THE New Jersey Supreme Court upheld the action of the board of commissioners in refusing to grant a telephone company a rehearing after it had disallowed the company's request for an increase in rates. The court, after passing on the procedural questions presented by the appeal, confined itself to examining three aspects of the original rate case — the rate base, income and expenses, and rate of return.

The company contended the board had completely ignored substantial evidence introduced in relation to reproduction cost. In refusing to set aside the rate base merely because the board did not fully adopt any one of the specific formulae submitted by the company, the court made the following comment:

> . . . there are a number of formulae useful in determination of fair value of a utility's property for use as a rate

base and ***the board is not and should not be bound by any simple formula or*** *combination of formulae.*

Precedent had long-established rules that should be followed to insure the reasonableness of a rate base, and the board, thought the court, had not abused any of these guides. The rate base should accord with fair value, but the board should not be required to couple the rate base directly to cost-of-living indices or current costs in material and labor markets. The disadvantage of adopting such a practice was particularly evident in this case since over 60 per cent of the company's gross plant investment reflected postwar prices and labor levels.

The court looked into objections of the company that some of the expenses disallowed or adjusted by the board, such as payments to the parent company under a license contract, payments into a pension fund to decrease unfunded actuarial reserve, and charitable contributions, were improperly dealt with. The court was of the opinion that even though the board might have committed technical errors in treating some of the expense items, the adjustments could not be said to be prejudicial to the rights of the company. They constituted a relatively small change in the rate base, their disallowance did not make the company's rates either confiscatory or unreasonable, and the company had not met the burden of proving their reasonableness as operating expense.

The treatment of claimed charitable contributions as an operating expense was typical of the manner in which the court disposed of the other objections. The board claimed that, even assuming a public utility corporation had the power to make such donations, they should not properly be allowed as operating expense and passed on to the consumer in the determination of rates. The general rule, said the court, is that such contributions will be allowed as operating expense where they have an effect upon services and may be construed reasonably necessary for the rendition of service.

Then, after observing that the reasonableness of all items of expense claimed by the company must be determined in a rate proceeding, and noting that the board had disallowed the expense on general grounds of disapproval, the court went on to say:

> Since the board did not dissect the items to determine their respective relationship to functional operation of the company, an error was made. However, the gross amount of these items, even if allowed, is insufficient to affect the reasonableness of the existing rates and therefore requires no remand in this respect.

The court concluded that the board had studiously analyzed all the evidence relative to rate base and its component elements. The board's determinations, even though some small parts might be in error, produced no arbitrary result when viewed in its entirety. The return of 6.37 per cent, after the board had adjusted various expense items, was fair and reasonable. *New Jersey Bell Teleph. Co. v. Department of Public Utilities, 97 A2d 602.*

Board Rejects Blanket Prohibition against Foreign Attachments on Telephones

The New Jersey Board of Public Utility Commissioners tentatively approved regulations submitted by a telephone company regarding automatic answering devices but indicated that, because of the experimental stage which answering devices are in at the present time, the situation would be reviewed at a later date.

The devices offered by the Bell system are the Peatrophone and Model I-A. Both are directly connected to the telephone line and were found to be proper and adequate.

The board described the devices offered by an intervener at the hearing in this paragraph:

> . . . (1) Notaphone, which was designed for direct connection to the telephone line, having an automatic remote control playback feature not found in any of the other instruments presented at the hearings; (2) the Telecord, a directly connected answering and recording device; and (3) the Telenova, an answering device only, which is connected in parallel to the telephone line.

A company regulation prohibiting foreign attachments was not considered unreasonable as applied to the intervener's instruments. But the board rejected the company's proposal that a blanket prohibition of foreign attachments be included in the company's regulation.

The board conceded that in earlier cases the foreign attachment provision had been upheld but pointed out that the underlying fact in every such case was that the foreign attachments in question would interfere with the company's rendering adequate service. The board's discussion follows:

> The fundamental tests here, as in all cases determining the reasonableness of respondent's foreign attachments provision as to some particular instrument, are (1) whether such instrument would interfere with respondent's rendering safe, adequate, and proper service, and (2) whether such instrument would place an unreasonable burden on the respondent's telephone subscribers in general. We wish to point out that we have not and we do not now give unqualified approval of the respondent's foreign attachments provision as to every instrument or device linked in any way with telephone service. The aforementioned tests must be applied in each individual case and have been applied in this case. For us to agree with respondent's argument would be to permit the extension of the monopoly of the telephone company to a degree not intended by the legislature and would tend to stifle advancement in the highly complex and important art of telephony. This would be contrary to the public policy of the state.

Re New Jersey Bell Teleph. Co. Docket No. 6142, August 5, 1953.

No Stone Left Unturned in Gathering Rate Base Information

THE Montana commission refused to authorize new rates submitted to it by a telephone company but approved a modified increase which would produce over one-half million dollars in additional intrastate net earnings. The company based its application on the increased costs of rendering service and the continuing demand for additional quantities and improved classifications for service requiring large amounts of additional capital.

The commission, in approving the contract between the company and the Western Electric Company for the purchase of materials, made this comment:

> This contract is not mandatory, and the company is free to purchase in other markets if it finds better prices, but it was shown to the commission's satisfaction that it was not possible to purchase in other markets at prices lower than offered by Western Electric. To fail to buy from Western Electric under the circumstances would be evidence of poor management on the part of the company. One example of this was the price of a telephone set. Western Electric's price to the company was \$13.07, while the lowest price in the general trade was \$26.06.
>
> Prices on other items were comparable, as to the differential.

An attempt to develop a rate base from the ratio of assessed valuation of prop-

erty within the state to market value was flatly rejected, with the statement that assessed valuation is not a good criterion for determining the worth of utility property in a rate case.

The commission considered all the evidence of value presented to it: reproduction cost new, less depreciation; original cost; and original cost depreciated; and stated its belief that "no stone had been left unturned as to its acquisition of relevant, material, and competent information in this case."

Neither the company's claim that dominant weight should be given reproduction cost nor protestant's claim that original cost less depreciation should comprise the rate base was correct. The commission's discretion is not limited in the matter of finding a proper rate base so long as the finding is within the ambit of the evidence.

The rates authorized would provide the company with a return of 5.8 per cent on the fair value of its property. *Re Mountain States Teleph. & Teleg. Co. Docket No. 4064, Order No. 2396, August 7, 1953.*

Consolidation of Affiliated Gas Companies Approved On Introduction of Natural Gas

THE Massachusetts Department of Public Utilities approved the consolidation of Boston Consolidated Gas Company and Old Colony Gas Company, both of which are wholly owned by Eastern Gas & Fuel Associates. These companies expect to receive natural gas from the Algonquin Gas Transmission Company in the near future, and they claim that it was principally because of problems arising thereunder that the companies entered into an agreement to merge.

Boston Consolidated has been supplying Old Colony with its entire gas requirements, and Old Colony has no stand-by generating facilities and has very limited storage facilities. Nevertheless, the commission did not deem it necessary to pass on the question whether continuance of the supply by Boston after the introduction of interstate natural gas would subject Boston to the Natural Gas Act and the regulations of the Federal Power Commission, with additional accounting requirements. The department found nothing in the proposal detrimental to the public interest.

A relatively large amount of new money must be raised whether or not the consolidation is approved. The department noted that Eastern could insist upon a higher capital cost if Old Colony is a separate and relatively small company than it could if Old Colony is a part of the very large and financially stable Boston Consolidated. The department did not concur in an argument that it was called on to protect the interests of the stockholders of Eastern Gas & Fuel as members of the public, but it was convinced that Eastern would be entitled to a higher rate of return on Old Colony securities than it would be on Boston securities. Therefore the merger would benefit users of gas in Old Colony territory. *Re Boston Consol. Gas Co. DPU 10076, 10465, September 2, 1953.*

Board Checks Customer Complaints against Fast Meters Following Conversion to Natural Gas

THE effect of a gas company's conversion from manufactured gas to natural gas on the company's metering system was one of several matters carefully scrutinized by the New Jersey Board of Public Utility Commissioners in an investigation of a number of customer complaints.

The board took official notice of monthly meter test reports submitted by the company. These showed that of about 4,000 meters tested 63.81 per cent

proved correct, 26.75 per cent were fast, 7.30 per cent were slow, and 2.16 per cent were defective in that they did not register or did not allow the gas to go through.

The board explained the operation of the meters in these words:

> An important feature of the meter is the bellows, formed by the diaphragm which is made of either leather (sheepskin) or a synthetic rubber material. If the diaphragm is made of leather, it is saturated with a neutral oil by the manufacturer to keep it pliable.
>
> It has been found that when natural gas is passed through a meter there is no effect on the accuracy of the meter if the original neutral oils are still in the diaphragm. However, if the meter has been used to measure manufactured gas distributed at low pressure and then without changing the diaphragm, it is used to measure natural gas, experience here and elsewhere shows that the meter may tend to overregister. This is so because the volatile oils in manufactured gas tend to displace the neutral oils with which the diaphragm was originally impregnated. Natural gas is a dry gas with an affinity for the volatile oils, so when it passes through a meter whose diaphragm is saturated with volatile oils, it absorbs them. Consequently, in the course of time, the diaphragm in such a meter becomes stiff and each pulsation of the bellows delivers less gas than the meter is calibrated for. If the meter diaphragm is made of synthetic material, the natural gas will have no effect on it so far as is known.

The board ruled that the percentage of fast meters in use was abnormally large and ordered that no meter be allowed to remain in service for a period of six years without testing.

The failure of the company to satisfy inquiries of customers or to correct service difficulties or billing irregularities was characterized by the board as "most unfortunate." No feature of utility operation, the board said, is more important than the broad area of contact usually referred to as "customer relations." Regardless of circumstances, every customer is entitled to have his legitimate service and billing problems dealt with sympathetically, promptly, and efficiently.

Complaints of space-heating customers that the annual cost of this service greatly exceeded the company's estimate were also examined. The board noted that frequently these complaints were occasioned by the customer's failure to install storm sash, insulation, or other heat-conserving devices which the estimator assumed would be provided. To minimize the number of complaints arising from this class of service, the board directed the company to provide the customer with a copy of its estimate so that the reasons for variations from estimates would be determinable. *Public Utility Commissioners v. New Jersey Nat. Gas Co. Docket No. 7274, July 22, 1953.*

Direct Competition Considered in Fixing Gas Rates

In 1949 the Florida commission authorized the Jacksonville Gas Corporation to fix rates that would yield a return of 7 per cent. The company recently claimed that it was earning much less than its allowable return. An increase in minimum charges was authorized.

A study revealed that the proposed increase was a modest one, as even these rates would not produce revenue enough to realize a return of 7 per cent. In addition, the company failed to produce in its rate base certain items which would be allowed as capital, and had such items been included, even more revenue than had been sought would be necessary to produce the desired return.

The company did not have a monopoly but was in direct competition, in so far as small consumers were concerned, with a municipal electric light plant and also with butane gas dealers and with kero-

sene and oil for heating purposes. The commission said that in fixing rates consideration must necessarily be given to such competitive aspects.

From that standpoint, an increase in minimum charges was considered the best means to obtain the required additional revenue. The proposed increase would primarily affect minimum users of gas who used gas as a stand-by for electricity, and such an increase would allow the company to recover readiness-to-serve expenses which are an incident to furnishing service to any customer.

In the previous case the company had been ordered to convert gas appliance customers from a flat to a metered basis. A request by the company to continue to serve such customers on a flat rate was granted. The company stated that such rates were based upon the maximum amount of gas used or consumed and had a direct relation to the cost of production in furnishing service to the customer in level and constant quantities over long periods of time. Customers had bought appliances on the assumption that they would have such a flat rate as long as they wished to use it, and the company was fearful that it would lose most of these nonpeak-load customers upon conversion. *Re Jacksonville Gas Corp. Docket No. 3830-GU, Order No. 1922, August 21, 1953.*

Attorneys Must Disclose Fees Received in Holding Company Simplification Proceeding

ATTORNEYS representing a holding company or its subsidiary in simplification proceedings before the Securities and Exchange Commission must disclose to the commission the amount of compensation received for such services, according to a Federal district court decision. Thus, Judge Grim upheld § 12(i) of the Holding Company Act requiring any person retained by a holding company or its subsidiary to present, advocate, or oppose any matter affecting the company before the commission to file with the commission certain prescribed information, including the amount of compensation received for such services.

Judge Grim conceded that the section was intended to comprehend the activities of "lobbyists" but that did not mean that Congress, in using the broad language, did not intend also to require disclosures of fees and expenses paid to lawyers for activities which, in many cases, might constitute nothing more than the legitimate practice of law.

The complaint did not charge any abuse in the lawyers' activities, but the absence of abuse was considered no reason for not requiring disclosures designed to deter abuse. Judge Grim said the payment of a fee higher than, and unrelated to, the value of legitimate legal services conceivably could involve payment for influence or supposed influence or a payment subject to the understanding that the recipient would make ostensibly on his own behalf, but really on behalf of his holding company client, the type of political contribution which his client was prohibited from making by the Holding Company Act. In this connection, he said:

> . . . the expenses of an attorney might include expenditures, whether or not specifically prohibited by § 12(h), which could be regarded as improper attempts to influence administrative or legislative activity. Since attorneys can act as lobbyists in the sinister sense of the word, and since the line between legitimate acts of persuasion and attempts at improper influence may frequently be a shadowy one, it is probable that Congress thought that it was necessary to require complete disclosures irrespective of the legitimacy of the particular services rendered, the reasonableness of the fees charged, or the propriety of the expenditures.

Securities and Exchange Commission v. Morgan, Lewis & Bockius et al. 113 F Supp 85.

Other Important Rulings

The Florida commission canceled rate tariffs of a public utility which converted from manufacturing carbureted water gas to furnishing liquefied petroleum gas, because a company engaged entirely in the distribution of liquefied petroleum gas does not fall within commission jurisdiction. *Re Southern Gas & E. Corp. Docket Nos. 3589-GU, 3616-GU, Order No. 1925, August 27, 1953.*

The Indiana commission ordered a transit company to extend bus service to a suburban residential area for a trial period of six months, in order to determine whether the demand for service was sufficient to compensate for increased operating costs (which the company claimed would result in a net operating loss) with the proviso that if it then appeared that public convenience and necessity did not require such extension, it could be discontinued. *Ostermeyer v. Indianapolis Railways, No. 382-A, May 1, 1953.*

The South Dakota commission revoked a contract carrier's certificate extension for the transportation of petroleum products where existing common carriers had experienced a diminution of volume of petroleum traffic up to 50 per cent and where such carriers were capable of providing adequate service to the points in question. *Re Heeren (Heeren Trucking Co), Report 10624-C, June 24, 1953.*

The trend of householders and businesses moving to suburban areas was a major factor in the Colorado commission's decision authorizing a motor carrier, transporting household furniture and office equipment within a municipality, to extend operations to within a radius of five air miles of the municipality. *Re Lee (G. I. Express), Application No. 12369, Decision No. 40818, July 1, 1953.*

Authority to operate a taxicab and local freight service was denied by the Colorado commission where the applicant failed to show that existing service was inadequate or that additional service was needed. *Re Reale, Application No. 12386, Decision No. 40814, July 2, 1953.*

A telephone company which had failed to take advantage of an available loan to modernize and extend its plant and thereby obtain a substantial and adequate profit under present rates was not allowed a rate increase by the Massachusetts department, since if the rates were increased, the company might still fail to improve its plant and service or, if the rehabilitation program were carried out, the return would be excessive because of more efficient operation. *Re Granby Teleph. & Teleg. Co. DPU 10512, July 14, 1953.*

Authority to discontinue certain railway passenger trains was granted by the Colorado commission where they were operating at a serious loss, where motorbus operations remained available to all towns affected and a stream-lined train served certain of the towns, and where substituted motor carrier service would take care of all head-end traffic. *Re Chicago, R. I. & P. R. Co. Application No. 12414, Decision No. 41036, July 31, 1953.*

The Florida Supreme Court held that rules and regulations of a commission are not subject to review by writ of certiorari when they do not possess that element of finality which is a prerequisite to judicial review and administrative adjudication is still open to the utility by way of motion for rehearing or an application for exemption under the rules. *Atlantic Coast Line R. Co. v. Carter, 66 So2d 480.*

The discretion of airport officials in denying a permit to operate a taxicab at such airport cannot be controlled by judicial coercion, ruled a Federal district court, since airport authorities operate government airports in their proprietary capacity. *Patton v. Administrator of Civil Aeronautics et al. 112 F Supp 817.*

Appendix—Part I

Important addresses on legal, economic, financial, and other problems, delivered before the Public Utility Law Section of the American Bar Association at Boston, September 24, 25, 1953.

A Report on Recent Cases Relating to Electric Utilities

BY JOHN LLOYD, JR.*

FPC Cases

IN the electric utility field, the Federal Power Commission has been the largest single contributor of new case law in the past year. It was a party in three cases in the Supreme Court, as well as others in the courts of appeal. In general, its cases dealt with the intent of Congress as expressed in the Federal Power Act and other Federal statutes, as affecting the scope of the commission's jurisdiction and powers.

Probably the most significant case of the year was the Roanoke Rapids Case.[1] The decision turned on the meaning of one word—"approved"—in an act of Congress. The commission had granted a license to Virginia Electric & Power Company to construct a hydro station at Roanoke Rapids, North Carolina. The Secretary of the Interior and an association of rural co-ops challenged this action.

They claimed that Congress, by its adoption of the Flood Control Act of 1944, had "approved" a comprehensive plan for the construction of this and other projects by the U. S. government. They said that the effect of this "approval" was to withdraw the Roanoke Rapids site from the licensing jurisdiction of the Federal Power Commission. They also claimed that the commission had concurred in the plan and had thereby determined that the Federal government should develop the Roanoke Rapids site.

A PRELIMINARY question was raised as to whether the Secretary of the Interior and the association of co-ops had any "standing" to challenge the commission's order. The court held that they did, but said that the differences in the views of the various members of the court on that point precluded the statement of a single opinion concerning it. Therefore, no opinion was stated.

On the main issue the court reviewed the legislative and administrative history relating to flood control in the Roanoke river basin from 1927 on. An important element in this history was a 1944 report to Congress made by the Army Engineers. This report recommended a comprehensive plan, to include eleven dams and reservoirs. Two of these had great flood-control value. Roanoke Rapids and all the others but one were, however, simply power development projects. The report recommended authorization of the two flood-control projects as the initial step.

In submitting the report, the Chief of Engineers stated that construction, operation, and maintenance should be under the direction of the Secretary of War and the supervision of the Chief of Engineers. By letter in 1944, the FPC concurred, substantially, in the recommendations of the report. Thereafter Congress enacted the Flood Control Act of 1944. The act related to many projects, all over the country, including the

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[1] United States ex rel. Chapman *v.* Federal Power Commission (1953) 97 L ed (Advance p. 574), 97 PUR NS 129.

Roanoke river basin plan. Of that the act said, that the Army Engineers' plan "is approved," and that construction of the two flood-control dams is "hereby authorized—at an estimated cost of $36,-140,000." The act also said that the government should not be deemed to have entered upon a project until the project is "adopted by law."

IN this history the court found no flat "approval" of a plan which clearly recommended public construction as an indispensable element. It also held that the word "approval" did not carry the implication of "adoption" or "authorization" by its own force. It interpreted the word to mean only a legislative finding that the projects were desirable, as a matter of policy. It pointed out that even though the two flood-control dams were "authorized," Congress took further action to complete the authorization, specifically by appropriating money for the work. It pointed to similar procedure followed by Congress in connection with a Savannah river "plan." The court said that a principal responsibility of the Federal Power Commission is to determine whether private construction is consistent with the public interest. It said that Congress' "approval" of a plan of development is not a reservation of all projects in the plan for public construction, unless Congress expressly says so.

Using harsh language, Justice Douglas dissented, Vinson and Black concurring. He referred to Roanoke Rapids as part of "the public domain," intended by Congress to be reserved "for the public good, not to make it available to private interests to exploit for their own profit." He called the grant of the license approved by the FPC a "raid on the public domain" and "an unconscionable appropriation." From such language, it would seem, to put it mildly, that Justice Douglas prefers government bureaus to regulated private enterprise as the means to be employed for the development of hydroelectric projects. The significance of the majority decision lies in its refusal to adopt a strained interpretation of statutes to accomplish any such end.

IN another case before the Supreme Court, arising under the Federal Power Act,[2] the court reviewed an order of the California Public Utilities Commission which determined that rates charged by California Electric Power Company for hydro-produced power delivered in California but carried by its purchasers into Nevada were subject to state regulation. The purchasers in question were a Nevada county, operating a municipal distribution system, and the U. S. Navy Department, which used most of its energy at an ammunition depot but sold from 15 per cent to 29 per cent to tenants at a Navy housing project.

Section 20 of Part I of the Federal Power Act was relied upon for state, as against FPC jurisdiction, the company being the holder of a license granted under Part I. Section 20 declares that rates for energy from a licensed project entering into interstate commerce "shall be reasonable" and gives to the FPC power to regulate such rates "wherever any of the states directly concerned has not provided a commission . . . to enforce the requirements of this section . . ." Both California and Nevada had such commissions. The Federal government's contention was, that FPC had sole authority to regulate the rates in question under Part II of the act, which gave FPC authority over rates for "the sale of electric energy at wholesale in interstate commerce."

SECTION 20 of the act was first enacted in 1920, and Part II came into the act in 1935. Between times, the Supreme Court held, in the Attleboro Case, that a state has *no* authority to regulate interstate transmission of power for resale, since that would be a direct burden on interstate commerce. In 1920, the law of the Attleboro Case was not yet declared.

Sustaining the jurisdiction of the FPC, the court said that it was not the intent of Congress, when it enacted Part II, to exclude "Part I, electricity." It said that

[2] United States *v.* California Pub. Utilities Commission (1953) 97 L ed (Advance p. 635), 98 PUR NS 65.

"Part II was intended to 'fill the gap'" left by the Attleboro decision, that "Part II is a direct result of Attleboro" and that "they are to be read together." It held, therefore, that the order under review should be reversed.

On a subsidiary point, the court held that the sales in question fell within the statutory definition of "a sale of electric energy to any person for resale," despite the fact that the word "person" was elsewhere defined in the act so as to exclude municipal corporations and the U. S. government. The court also held that the sale to the Navy was a "sale for resale" of the entire volume of electricity transmitted to the Navy, since the record did not show that the resales to individual purchasers were identifiable as separate transactions.

In a concurring opinion, Justice Jackson referred to the court's interpretation of the statute as being reached not "by analysis of the statute" but "by psychoanalysis of Congress." In a separate opinion, Justice Frankfurter thereupon said that the "light shed" by Justice Jackson's concurring opinion caused him to have such doubts that he would leave the decision to the other members of the court.

In a connected case, involving a review of the Federal Power Commission's order based upon the same facts, the court of appeals for the ninth circuit sustained the FPC order asserting its jurisdiction, and the Supreme Court denied petitions for review.[3]

A third case in the Supreme Court was that of Federal Power Commission *v.* Idaho Power Co.[4] In this case the commission had granted a license to the company for a hydro project (dam and power plant) on the Snake river. The project was designed to occupy 500 acres of U. S. land and to include two transmission lines interconnecting the company's primary transmission system. The U. S. had power projects in the same area, and at the suggestion of the Secretary of the Interior the commission attached to the license a condition requiring the company to permit the interconnection of transmission facilities of the U. S. with the two new lines, and the transfer over those lines of energy generated in U. S. power plants "in such amounts as will not unreasonably interfere" with the company's use of its lines. The government was required to pay for its use.

Again examining the statute to determine the intent of Congress, the court held that the commission had authority to attach the condition, in protection of the public domain, the conservation of water-power resources, or the development of comprehensive plans for waterways. It held also that §§ 201 and 202 of the act, being in Part II and dealing with interconnections generally, did not apply, saying, "They do not deal with the grant of licenses."

In Niagara Mohawk Power Corp. *v.* Federal Power Commission,[5] which is on its way to the Supreme Court,[6] the court of appeals of the District of Columbia reversed an order of the commission which disallowed payments totaling $798,000 claimed by the company as operating expenses. The payments arose in good faith from arm's-length transactions. The result of the disallowance was to increase the reserve required by the company as a licensee under the Federal Power Act by $399,000, one-half the amount of the payments. The payments had been made to two other companies as part of the purchase price for rights to use the waters of the Niagara river. The rights had been acquired by the two companies or their predecessors prior to the enactment of the Federal Power Act. The commission in effect contended that the rights had been extinguished by state and Federal legislation.

As a preliminary matter it was argued that the issue was *res judicata* because

[3] California Electric Power Co. *v.* Federal Power Commission (CA 9th 1952) 199 F2d 206, 96 PUR NS 65, cert. den. 345 US 934, 961.

[4] (1952) 344 US 17, 96 PUR NS 45.

[5] (CA DC 1952) 202 F2d 190.

[6] Certiorari granted May 18, 1953, 345 US 955.

of a prior, unappealed ruling of the commission adverse to the company, involving the same issue, though in a less important connection. Overruling this contention, the court said, "*res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals."

On the main issue the court found that in New York a riparian owner owns a property right in his right to make use of the waters of a stream for power purposes. Such a right is subject to the paramount authority of both state and Federal governments. But the court said that New York had never destroyed the rights here in question, although it had regulated them. It also said that the U. S. in adopting the Federal Water Power Act (Part I of the Federal Power Act) did not destroy the rights. It said:

> Congress had absolute power to stop Niagara Falls Power Company from taking any water whatever. . . . But . . . it has never exercised that power, and the only term it has imposed is that a Federal license be obtained. Such a license is a certificate that the exercise of the water rights therein described—rights which are valid under state law—does not interfere with navigation nor with any other use in commerce to which the flow of the stream might be put. . . .

The court also said that much of the difficulty of the case arose from "a misconception of the Water Power Act and of the nature of licenses thereunder." It said:

> The act is purely a regulatory measure. A Federal license is not an original grant of authority, but a permission to use a state's grant of authority.

In a dissenting opinion, Judge Bazelon said that in his view "the Federal Power Act does assert the pre-emptive right of the U. S. in the exercise of its power to regulate commerce and does not save the private rights in question."

It would seem that in this case the Supreme Court will be presented with a very basic question of interpretation of the Federal Power Act. A collision with Justice Douglas' views on the "public domain" may be expected.

In one more case involving the Federal Power Commission, the court of appeals of the District of Columbia sustained an order of the commission ordering Wisconsin Power & Light Company to file rate schedules covering the company's service to four municipal distributing systems in southwestern Wisconsin,[7] and the Supreme Court refused to review the decision (certiorari denied, 345 US 934). The company had acquired certain facilities serving the municipalities in question, and at the time of acquisition the power being sold to the municipalities was coming in part from Illinois, title passing at the state line; but the company was arranging to furnish power from intrastate sources. The court held that the FPC had jurisdiction over the rates charged to the municipalities, under § 205 of the Federal Power Act.

On a subsidiary issue, the court held that the FPC, as a regulatory agency, could and should take official notice of the reports filed with it by a regulated company.

Other Cases—Miscellaneous

The New Hampshire Supreme Court decided a rate case on January 6, 1953.[8]

It held that the public utility commission did not commit error when it refused to receive offered evidence of reproduction cost where the company also offered evidence of rate base on a net investment theory. It said that, in the absence of statute requiring otherwise, evidence of reproduction cost "may be disregarded or rejected if the commission thinks it is not entitled to be given weight in the case before it." The New Hamp-

[7] Wisconsin *v.* Federal Power Commission (CA DC 1952) 201 F2d 183, 97 PUR NS 489.

[8] Chicopee Mfg. Co. *v.* Public Service Co. 93 A2d 820, 98 PUR NS 187.

shire statute declares simply that the rates "shall yield not less than a reasonable return on the cost of the property used and useful in the public service less accrued depreciation." The court said that the statute allowed the commission "to consider or reject evidence of reproduction cost," and that "There is no vested right to any particular method of valuation."

On rate of return, the court sustained as not "confiscatory" the commission's allowance of 5.65 per cent, which was something in excess of the proved cost of money and equated to a return of 10.90 per cent on the actual equity. The court said that the company was entitled to a return sufficient "to maintain its credit and attract the necessary capital to meet increased demands for improvement and extension of its service." The court disapproved a statement made by the commission to the effect that the company should not use excess earnings to increase dividends on common stock and should use such excess to improve its "capital structure."

THE court held it error for the commission to deduct from a rate base a reserve resulting from a book profit made on the sale of a generating plant. The profit belonged to the stockholders, said the court, pointing out that a loss could not have been charged to future customers and by the same token a profit could not be awarded to them. It said the event provided no "basis for reaccounting for depreciation."

As to working capital allowance, the court said it was permissible for the commission to deduct average income tax accruals where the rates were in fact providing current funds for taxes payable at a much later date. The court said, however, that it did not "lay down any rule of law" in this connection, the question being one of fact for the commission to decide in each case.

As to a finding of rate base, the court held it error for the commission to use a year-end rate base to relate to earnings over the full year. The court said the commission should have correlated "a year-end rate base with year-end income" or "an average rate base with average income for the year."

THE Arkansas Supreme Court dealt with an unusual question in Arkansas Electric Co-op. Corp. *v.* Arkansas-Missouri Power Co.[9] There the co-op had applied for a certificate of convenience and necessity to authorize its building of a 30,000-kilowatt steam-generating station and 544 miles of transmission lines. Four private utilities and two labor organizations opposed the application.

Arkansas Electric was a federated co-op formed by three distribution co-ops, whose electric needs were supplied by the private companies. The proposed plant would have supplied three times as much power as the three distribution co-ops presently required. To utilize the difference, Arkansas Electric proposed to enter into a long-term contract with Southwestern Power Administration under which the facilities would have been incorporated into the administration's hydro system and the administration would have had complete control of the plant for forty years. Construction would have been financed by a loan from REA.

The court said that the transaction was in substance an instalment sale of the property to Southwestern Power Administration.

THE court held that Arkansas statutes did not authorize Arkansas Electric to sell its electricity to the administration, since the statute under which the co-op was formed limited sales of energy to members only, and limited members to persons in rural areas, not receiving central station service, who agree to *use* electric energy; and Southwestern Power Administration met none of the last three requirements.

The court further held that the proposed contracts were contrary to Fed-

[9] (1953) 255 SW2d 674, 98 PUR NS 33.

eral law, as violating the intent of Congress that the administration's function should be to sell hydro power in wholesale quantities rather than to sell at retail by the integration of steam power.

The court affirmed the action of the court below in denying approval of the application.

THE Iowa Supreme Court disposed of a minute, but interesting, question in Berner *v.* Interstate Power Co.[10] There the plaintiff sued the company for damages for having discontinued service to her residence on account of an unpaid bill covering her place of business, which was no longer in operation. The company's filed tariffs provided:

> The company may refuse to render service to any applicant indebted to the company for service rendered at another location until the customer has paid, or made satisfactory arrangements to pay, such indebtedness. . . .

The court recognized that a utility is not free to accept or reject its patrons, and that it may therefore adopt regulations "that service may be refused at a new address as to a customer delinquent as to a former address" and "that service may be cut off at a given address on account of a delinquency at such address." But it held that the application of the company's rule in the instant case was "unreasonable as exacting from the appellee's patrons something to which it was not entitled under the law."

The court indicated that cases in New York, Oregon, and South Carolina have adopted a contrary view, but it chose to follow Idaho and New Mexico cases which hold that service to each address to which service is furnished, and which is handled and billed as a single unit, represents a wholly separate and independent transaction, irrespective of the fact that one individual may receive bills for various addresses or units served.

The plaintiff was held to be entitled to recover.

IN Utah Power & Light Co. *v.* Public Service Commission[11] the Utah Supreme Court reviewed an order of the commission which required Utah Power & Light Company to serve Nephi City, a municipal corporation operating a municipal plant. Prior thereto the city purchased power from Telluride Power Company, whose territory surrounded the city, at a higher rate than was provided in Utah's filed schedules which covered service at wholesale to municipalities. The city offered to build a transmission line to a point in Utah's territory.

Utah contended that it would be required to render service in an area it never professed to serve, and that such requirement would constitute a taking of its property without due process of law. But the court said: "The energy . . . is to be sold within the territory served by the Utah Power & Light Company and not elsewhere," and it said that by its filed schedules Utah had held itself out as ready to furnish such service.

Telluride contended that the commission was authorizing invasion of its territory. But the court said that a municipality operating a municipal plant could not be in any company's exclusive territory.

THE commission's order was affirmed, over the strong dissent of Judge Henriod, Jr., who said that a municipality as a customer should be cast in the same rôle as any other customer, and that "as a purchaser of power, municipal personality should make no magic." He also said:

> Consumers are to be protected. So are pioneer suppliers in an area who furnish the risk capital, else the theory of public utility administration and regulation fails of purpose. . . . higher or lower rates never have been the sole test of convenience and necessity certification.

And he said:

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10 (1953) 57 NW2d 55, 98 PUR NS 58.

11 (1952) 249 P2d 951, 97 PUR NS 373.

. . . public interest has been fostered by inviting and protecting, in reason, the risk capital and the area of its expenditure against economic interlopers.

As a supporter of private enterprise, may I close by remarking that I find only one fault with the language used by Judge Henriod and quoted above: It is buried in a dissenting opinion.

Developments in the Law Relating to Natural Gas During 1952-1953

By C. W. COOPER*

A GOOD beginning for any talk with respect to natural gas utilities is that there are plenty of current developments and plenty of current legal problems. In fact as the industry grows in importance and spreads over the country, the number of legal problems appears to be growing.

In reflecting on the job of keeping natural gas fitted within a utility concept, it is becoming more and more apparent that natural gas presents striking differences from railroads or other common carriers, telephones, or electric companies.

The chief problem which I have had in preparing this short talk is to choose among the many possible subjects. There have been important legal developments, on which I will not be able to touch, in matters of accounting, discrimination, safety rules, underground storage, and condemnations. The problem of safety rules as enacted by several states is an entirely new matter to the gas industry. There have been numerous important condemnation cases during the past year as a result of the use by the pipeline companies of the relatively new condemnation provision in the Natural Gas Act.

The matters which I regard as being of most general interest and importance and on which I would like to say a few words are the following:

(1) Certain new procedures adopted by the Federal commission;
(2) Developments in the Ashbacker Case principle;
(3) Three substantive rate issues; and
(4) Certain jurisdictional matters.

1. *Procedural Regulations under the Natural Gas Act*

IN recent years there has been tremendous activity in two fields of Federal regulation under the Natural Gas Act—rate increases and applications for certificates of convenience and necessity. The annual reports of the Federal Power Commission recite statistics on these matters and stress the magnitude of the resulting burden on its staff.

To cope with the problem the commission has adopted new procedural techniques which are both novel and drastic. They are of broad general interest to all fields of regulation.

In prior years the general practice in both certificate and rate proceedings had been to make a relatively simple filing which, on most issues, stated a summary or conclusion and left the submission of detailed proof to await informal conferences with the staff or the formal hearing.

In rate cases, for example, the original filings made no attempt to support the claimed rate of return. This was left to expert testimony at the hearing. In certificate cases the evidence as to geology and market requirements was generally left to oral testimony at the hearing. Indeed, at the time of filing, many aspects of the case had not even been worked out and the filing was made to secure a position on the commission's calendar and, particularly in rate cases to start the running of the inevitable suspension period.

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During 1952 and 1953, as a result of the great number of filings, the commission adopted the fundamental position, as to both certificates and rate increases, that a company should complete its case in all fundamental respects prior to the filing and that its statements, when initially filed, should include a complete and definitive presentation on all substantive issues. The commission buttressed this position with the principle that any filing which did not include all such data should, on ex parte consideration, be summarily rejected and stricken from the files.

Consequently, on July 28, 1952,[1] the commission adopted new regulations governing certificate applications, and on May 21, 1953,[2] it adopted new regulations governing the material to be submitted in support of rate increase filings.

Each regulation requires the preparation of data in tremendous detail prior to filing. Each attempts to systematize the presentations. Each strikes into new and untrodden territory on several important points.

For example, in rate filings data must be submitted on the basis of a specified test year regardless of the fact that in case after case the commission itself has used and continues to use different test periods and regardless of the fact that—in a given case—the specified test year is obviously abnormal and inappropriate.

The chief problem in connection with these rules is not so much the character of the data for which they call as it is the inflexible requirement that all of this data be supplied at the time of filing and as a condition to the right to get on file.

Time is of the essence in many instances—particularly in rate matters. And there will be important cases where the data just cannot be assembled or computed or compiled with sufficient rapidity.

In the administrative proceedings which led up to the promulgation of the rules, it was strongly urged that the commission's policy be more flexible and that the right to file be fully protected. It is earnestly hoped that further consideration will be given to this point.

It has been mentioned above that the new rules include the provision that any filing which does not represent full compliance will be rejected. In connection with this policy there were two important instances during 1952 in which the commission rejected rate increase filings. Both cases were appealed, and in both the commission was found to have exceeded its authority and was reversed.

One case involved schedules filed by Atlantic Seaboard Corporation and rejected by the commission for the omission of certain data specified in the rules. Seaboard promptly supplied the data in accordance with the rules. The commission refused to treat the amended filing as dating back to the original date, thereby postponing the increase. On appeal the circuit court of appeals for the fourth circuit reversed the commission on the ground that it had abused its discretion in not accepting the amended filing as of the time it was originally tendered.[3]

The second case involved rate schedules filed by Mississippi River Fuel Corporation in which the supporting data admittedly represented full compliance with the regulations. But in this instance, after an ex parte consideration of the matter, the commission rejected the schedules because of doubt as to the company's ability to meet the statutory burden of proof in support of the increased rates. On appeal the circuit court of appeals for the third circuit held that the commission had no statutory authority to reject schedules on an ex parte decision as to the substance of the increase. The court held that the Natural Gas Act gives a statutory right to a hearing and an opportunity to meet the burden of proof at that hearing.[4]

[1] (FPC) Order No. 163 in Docket R-120.
[2] (FPC) Order No. 165 in Docket R-124.

[3] Atlantic Seaboard Corp. *v.* Federal Power Commission (CA 4th 1953) 201 F2d 568, 98 PUR NS 474.
[4] Mississippi River Fuel Corp. *v.* Federal Power Commission (CA 3d 1953) 202 F2d 899, 99 PUR NS 26.

2. The Competing Certificate Applications of Northeastern and Algonquin to Serve Southern New England

THE next matter which I would like to touch is the competitive certificate proceedings of Northeastern Gas Transmission Company and Algonquin Gas Transmission Company relating to the right to sell gas at wholesale in southern New England and here in the Boston area. This litigation is of wide interest to all utilities because it is an excellent study in the application of the Supreme Court decision in Ashbacker Radio Corp. *v.* Federal Communications Commission[5] where it was held that a regulatory commission cannot grant one of two competing applications without having given a full hearing to both.

In 1950, after long hearings involving the applications of Northeastern Gas Transmission Company and Algonquin Gas Transmission Company, the Federal Power Commission first issued a certificate to Northeastern to serve part of New England, but, while finding that it would probably issue a certificate to Algonquin, it continued the certificate proceeding as to Algonquin until certain additional proof could be adduced. Thereupon Northeastern filed a second application to serve the whole territory including that proposed to be served by Algonquin. The commission refused to hear Northeastern's second application, and, in February, 1951, after receiving the specified additional proof, issued a certificate to Algonquin.

ALGONQUIN immediately proceeded with the financing and construction of its pipeline and by late 1952 the line was substantially completed at a cost of nearly $52,000,000.

Meanwhile, Northeastern appealed the case. In April, 1952, the court of appeals for the third circuit held that the commission had committed error in issuing a certificate to Algonquin without hearing Northeastern's second application. The Supreme Court refused review and in October, 1952, the matter was remanded to the commission with the direction that the certificate of Algonquin be voided and that further hearings be held.[6]

Algonquin's line was virtually complete by the time the certificate was voided. Algonquin, therefore, applied to the commission for temporary authorization to put its line into service pending the outcome of the hearing directed by the court of appeals. Such a temporary certificate had been issued in the Ashbacker Case. The application had wide support from the public to be served in New England. The commission denied this application by a 3-2 decision, on the ground that the Natural Gas Act does not authorize issuance of a temporary certificate without hearing except for the limited purpose of assuring the maintenance of adequate service theretofore in effect, and since Algonquin had not yet begun operations there was no service to be maintained.[7] This decision was sustained by the court of appeals for the first circuit here in Boston.[8]

IN order to build its line Algonquin had condemned rights of way, its right so to do being predicated on the certificate which it had held under the Natural Gas Act. After the voiding of the certificate various landowners brought injunction proceedings in the state courts of New York to compel the removal of the pipe from the condemned rights of way. The state trial court of Westchester county, New York, granted the injunction directing prompt removal. But on appeal the appellate division for the second judicial department granted a stay of the injunction pending the ultimate outcome of the renewed proceedings.

Hearings on the case were resumed by the commission in November, 1952,

[5] (1945) 326 US 327, 61 PUR NS 466.

[6] Northeastern Gas Transmission Co. *v.* Federal Power Commission (CA 3d 1952) 195 F2d 872, 95 PUR NS 422.

[7] *Re* Algonquin Gas Transmission Co. (FPC) Docket No. G-1319.

[8] Algonquin Gas Transmission Co. *v.* Federal Power Commission (CA 1st 1953) 201 F2d 334, 98 PUR NS 462.

and continued with only slight interruption until June, 1953, a period of more than six months. Briefs were submitted and argument was had in July.

On the sixth of this month (August),[9] the commission issued a second certificate of public convenience and necessity to Algonquin granting to it essentially the same rights that were provided by the original certificate. Two passages from the decision are of particular interest:

> The interests of investors in stocks and bonds of this company (Algonquin) must be considered as a matter of public interest. Certainly, it would not be in the public interest to authorize duplicate facilities which would render useless this substantially completed project of Algonquin, with a consequent loss to these investors of untold millions of dollars, even assuming that they would be able to recoup some of their investment by salvage or otherwise. Such losses, if incurred by these investors in the Algonquin Company must of necessity be reflected in some manner upon the stockholders of these companies and the policyholders of the insurance companies now holding the bonds of Algonquin.
>
> We are fully cognizant also of the fact that Algonquin's substantially completed project was constructed—and substantial investments therein were expended—pursuant to a certificate issued by this commission, which was set aside by the court of appeals for procedural reasons and not because of any substantive error in our findings and conclusions as to the necessity for or desirability of Algonquin's project and proposed operations.

It is of great interest that in the new certificate rules which were issued July 28, 1952,[10] the commission has sought to deal with the competitive application problem by providing that when an application is filed less than fifteen days prior to the commencement of hearings theretofore ordered on a pending application, the commission will not schedule the new application for hearing until it has decided the first one. If this rule is sound and had been in effect, Northeastern would have had no standing to appeal in the above proceeding.

3. *Rate Problems*

REGULATORY *Lag.* At the session of the Public Utility Law Section in September, 1952, discussion centered on "regulatory lag," and what I will say here constitutes an addendum to that discussion.

To some extent the problem has been overcome by the interstate pipeline companies. During the past two years, the bulk of the pipeline company rate increases has been predicated on increases in contract prices for gas in the producing field. Most such field price increases are being occasioned by "renegotiation" and "favored nation" clauses and pipeline companies are generally able to anticipate both the time and amount of such increases. Consequently, such companies have been filing new schedules just six months in advance of the step-up date in the field price structure, thus allowing for the 30-day filing period and the 5-month suspension period under the Natural Gas Act. By exercising the statutory right to put the rates into effect at the end of the suspension period, the pipeline companies are at least able to cover this principal item of cost as soon as it occurs.

As a general proposition the local utilities are not so favorably situated. As William A. Dougherty pointed out at this session last year, some state laws permit increased rates to be put into effect only upon application. Others have periods of suspension of as much as ten months. Others provide for the establishment of new rates only upon the termination of rate contracts with municipalities, and such contracts may be firm for a period of years.

[9] (FPC) Opinion No. 259, Docket Nos. G-1319 et al.

[10] (FPC) Order 163 in Docket R-120.

APPENDIX

SINCE large increases in pipeline rates are going into effect and the bill for purchased gas is becoming a larger and larger portion of the total costs of local utilities, any lack of harmony between Federal and state procedures becomes more and more critical to the local utility.

An illustration of the problem is provided by the decisions of the Michigan Public Service Commission in *Re* Michigan Consol. Gas Co.[11] Michigan Consolidated buys its gas supply in part from Panhandle Eastern Pipe Line Company and in part from Michigan Wisconsin Pipe Line Company. In 1951 Panhandle filed with the Federal Power Commission an increase in its gas rate from 18.6 cents to 29 cents per MCF but this was suspended until February 20, 1952. This represented a 50 per cent increase in gas cost. Also in 1951 Michigan Wisconsin filed an increase of 3.5 cents per MCF. In due course the two pipeline companies put their rates in effect under bond. In December, 1951, Michigan Consolidated filed an application with the state public service commission. But hearings in the state commission case could not be completed until October, 1952, and so Michigan Consolidated could not receive relief until the order issued in November. Hence for over nine months it was absorbing the two pipeline company increases.

ONE possible form of relief to the local utilities is by way of fuel adjustment clauses. Such clauses are in fairly common use as to the rates of electric, steam, and manufactured gas utilities. But they have not come into general use with natural gas. Therefore, a most interesting development on the subject is the action of the New York Public Service Commission on June 29, 1953, allowing the five large utilities in the metropolitan New York city area to impose fuel adjustment charges predicated on variations in the cost of gas purchased from Transcontinental Gas Pipe Line Company. The necessities of the situation are indicated by the fact that the New York commission had had a long-established policy of determined opposition to fuel clauses predicated on the cost of gas.[12]

Applications on a like basis are pending before other state commissions. It is to be hoped that this practice may be extended, for, in view of the statutory right of the pipeline companies to force new rates into effect, some such device is a practical means of protecting the local utilities.

RATE *of Return.* The discussion by Milford Springer at the session of the Public Utility Law Section last year dwelt at length on the "cost-of-money" theory of return then recently adopted by the Federal Power Commission in *Re* Northern Nat. Gas Co.[13] It will be recalled that the Federal Power Commission had since 1946 utilized an industry-wide rate of 6 per cent, but in the Northern Case it fixed the return at 5½ per cent by means of a simple mathematical formula predicated in part on the cost of 2.55 per cent which Northern had experienced in raising its debt capital and in part on the then current appraisal of the security market as to the cost of equity money.

Thereafter, the commission reaffirmed this method in *Re* Colorado Interstate Gas Co.,[14] allowing that company a rate of 5¾ per cent. And in *Re* Mississippi River Fuel Corp.,[15] a similar calculation produced the traditional 6 per cent.

The appeal of Northern was decided on July 20, 1953, by the circuit court of appeals for the eighth circuit.[16] The court did not approve or disapprove the "cost-of-money" formula as such. But it did disapprove the fact that the commission had arrived at its ultimate conclusion without finding that the allowed return was adequate in the light of those

[11] July 28, 1952, 95 PUR NS 177; November 19, 1952, 97 PUR NS 350.

[12] *Re* Brooklyn Borough Gas Co. (NY) Case 16189 et al. June 29, 1953.

[13] (1952) 95 PUR NS 289.

[14] (1952) 95 PUR NS 97.

[15] (1952) 95 PUR NS 435.

[16] Northern Nat. Gas Co. *v.* Federal Power Commission, Case No. 14706 et al.

general economic considerations which have long been emphasized by both courts and commissions, such as the risks of the particular business, the company's financial standing, and the conditions in the money market. These considerations have been outlined in many cases and I need not repeat them here. The court, therefore, returned the case to the commission with the direction that it make full and complete findings as to the adequacy of the return.

THIS decision of the eighth circuit court means that the commission cannot arbitrarily apply a cost-of-money formula without at the same time considering the broad aspects of the return question. On the other hand, the decision does not compel the commission to return to its former policy of applying a uniform industry-wide return.

I understand that Northern Natural intends to ask the Supreme Court to review its case, on the issue of return as well as other issues. Furthermore, Colorado Interstate Gas Company presently has an appeal pending in the court of appeals for the tenth circuit from the abovementioned order of the commission.

Since this recent decision of the eighth circuit court in the Northern Case, the Federal Power Commission has made one rate order involving rate of return, in *Re* United Fuel Gas Co.[17] The decision first finds that the cost-of-money formula in that instance results in a rate of approximately 6 per cent. The opinion then reviews the conditions in the money market, the need of the company for additional capital, and other relevant circumstances, and concludes that 6¼ per cent is the proper rate of return. One important statement is that the company "has resisted the lure of an undue thinning of the equity and has maintained a conservative capital structure. Return should be sufficient to encourage continuation of this practice."

It should be noted that the decision in the United Fuel Case was made when only three commissioners were present, and, of these, Commissioner Doty dissented. As to the attitude of the full commission in the light of the appellate court decision in the Northern Natural Case we, as yet, have no indication.

It may certainly be said, however, that there is small comfort for the exponents of an industry-wide return in either the opinion of the court of appeals in the Northern Case or the decision of the commission in the United Fuel Case.

THE *Conflict between State Minimum Value Laws and Federal Regulation on a Cost Basis.* The decision of the court of appeals for the eighth circuit in the Northern Natural Gas Company Case deals also with the weight which the Federal Power Commission must give to minimum field value regulations of producing states such as Oklahoma and Kansas. This is a very thorny issue.

Since the early 1940's the commission has allowed to pipeline companies only the cost of any gas which they themselves produce, even though this "cost" in most cases is a small fraction of the value of the gas, as demonstrated by prices paid to independent producers in the same field.

This policy, though bitterly opposed by the pipeline companies, was sustained by the Supreme Court.[18] There have been several unsuccessful attempts to change the result through amendment to the Natural Gas Act.

Subsequently those producing states which have adopted minimum price regulations for the sale of gas in the field have provided regulations under which a pipeline company must attribute a like minimum wellhead value to its own produced gas.

Northern Natural, which produces gas from its own wells, claimed that the cost of service to be used in fixing its rates should reflect the 8-cent minimum value which the Kansas regulation directs should be attributed to all gas produced

[17] (FPC) Opinion No. 258, August 7, 1953.

[18] Colorado Interstate Gas Co. *v.* Federal Power Commission (1945) 324 US 581, 58 PUR NS 65.

in the state. The record showed that by normal commission methods the cost to produce the gas was 5 cents. The commission refused to allow the claim of 8 cents and fixed rates on the basis of cost.

THE court of appeals upheld the commission on the ground that state regulations may not dictate to the Federal government what formulae shall be utilized in fixing rates for sales by a pipeline in interstate commerce. In part the opinion states:

> The Federal power to regulate the commerce in natural gas derives directly from the Constitution and is, of course, the dominant power. To the extent that Congress has entered the field, exercised its power, and authorized its commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail. The decisions of the Supreme Court in the Panhandle, Colorado Interstate, and Hope cases all turned squarely upon the issue and affirmed that Congress has made such grant of power to the Federal commission.

It is my understanding that Northern Natural will seek to appeal this holding to the Supreme Court.

4. *Jurisdiction under the Natural Gas Act*

THE principal jurisdictional problems in the industry, as usual, concern field prices, on the one hand, and local utilities on the other.

THE *Phillips Case*. Viewed from any angle, the decision to be made by the Supreme Court this fall in the Phillips Petroleum Company Case will be of momentous importance to the whole gas industry and will undoubtedly have great influence on its future development.

The Federal Power Commission in 1951 held that it did not have rate jurisdiction over sales by Phillips to interstate pipeline companies, the basis being that Phillips is a producer and gatherer and that its sales, though interstate commerce, fall within the exemption of "production" and "gathering" in § 1 (b) of the Natural Gas Act.[19] The commission later reaffirmed this decision in several cases, among others in *Re* Kansas-Colorado Utilities, Inc.[20]

The Phillips Case was appealed by the state of Wisconsin, the city of Detroit, Kansas City, and other consumer interests, and on May 22, 1953, the court of appeals for the District of Columbia reversed the commission, held that jurisdiction exists, and directed that rates be fixed for sales in the field. The specific holding is that the exemption of "production or gathering" does not extend to interstate sales of gas by the corporation that produced or gathered it. The court of appeals relied directly on the Supreme Court decision in the Colorado Interstate Natural Gas Company Case.[21]

Needless to say, the interest in this case is intense. But, whatever the decision, the course of regulation will be difficult. If the rates must be fixed, it will take a master-mind to devise regulation which will not discourage the development of future gas supplies. On the other hand if jurisdiction does not exist, the commission will be faced with issues in the difficult form dealt with in the Northern Natural Case; for Federal regulation may allow the costs paid by a pipeline company only to the extent that it finds them to be reasonable.

THE *Hinshaw Bill*. Congress had before it during the past session several bills to reverse the East Ohio Gas Company Case by which local utilities, though subject to general state regulation, are regulated in part by the Federal Power Commission.

Such legislation has the support of the National Association of Railroad and Utilities Commissioners, various state regulatory bodies, and the Federal

[19] *Re* Phillips Petroleum Co. (FPC 1951) 90 PUR NS 325.
[20] (FPC 1953) 97 PUR NS 156.
[21] (1945) 324 US 581, 58 PUR NS 65.

Power Commission. A bill passed the House of Representatives and was reported favorably by the Interstate and Foreign Commerce Committee of the Senate on July 30th, but could not be brought before the Senate before its adjournment. Hence it remains for consideration at the next session of Congress. In the 82nd Congress, similar legislation passed the Senate but could not be brought before the House of Representatives.

The bill which is presently before Congress, as agreed to by the Federal Power Commission, is the Hinshaw Bill (HR 5976) which provides that the Natural Gas Act shall not apply to local utilities which engage in transporting or selling gas in interstate commerce, if such companies receive and handle natural gas wholly within the state in which it is ultimately consumed, and if the company and facilities are subject to regulation by a state commission. The bill further provides that any matters so exempted from the Natural Gas Act shall be subject to regulation by the states.

5. *Conclusion*

THE two most important appellate decisions during the year undoubtedly were those dealing with Northern Natural Gas Company and Phillips Petroleum Company. Each of those cases will be dealt with by the Supreme Court —either through decision or denial of certiorari.

To the local utilities the most important practical problem to come forth during the year is that which is occasioned by the recurrent nature of the rate increases being made by the pipeline companies, and in conclusion I would like to make one further remark on that score.

For the past several years the regulatory approach of the Federal Power Commission has been that, since the pipeline companies may file for increases as often as they like, rate regulation may safely be placed on a strict minimum current cost basis. This doctrine—and it has been applied most strictly—has forced the pipeline companies to file new rates as often and whenever their costs have increased. For example, the Tennessee Gas Transmission Company has been forced to make major increases in each of the last three years.

This approach may be satisfactory from the viewpoint of the pipelines—but when looked at from the viewpoint of the consuming public the situation, in many cases, becomes convulsive and unmanageable. State regulatory procedures are normally more cumbersome—particularly since one is there dealing with the consuming public—and recurrent rate cases present difficult problems.

Developments in the Law—Communications Utilities

BY T. BAXTER MILNE*

WHEN your chairman invited me to be one of the people to discuss developments in utility law, I fully realized the work which would be required in preparing this paper, but despite that disadvantage I accepted with pleasure. When we last met in Boston in 1936, I was one of the discussion leaders (as we called them in those days) and now seventeen years later I have the same privilege.

I have been engaged in the field of public utility law for over thirty-two years and for over twenty-five years I have been actively connected in one way or another with the work of this section. However, my appearance today is somewhat different from prior years. During that thirty-two years, I was an active employee of the Bell system but as of May 1, 1953, I was retired from my position as general attorney of New England Telephone & Telegraph Company. This change does not diminish my interest in

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utility law nor does it require any change in direction of my views as I have always sought impartial discussion of the subjects before us. But one thing I must make clear: I do not speak as a representative of the Bell system. Nor am I in any position, even if it were possible to do so, to discuss what the Bell system may believe developments might have been in the past or might be in the future. The views I express are my own.

REGULATION *Generally.* Last year Fletcher Rockwood discussed the developments in the law relating to telephone companies and he pointed out that in large measure regulation of rates of communications companies has been a continuance of the process of postwar adjustments. The same statement may be made in relation to the past year and the report of the section's Standing Committee mentions cases illustrating that, as between different classes of utilities, there are general questions affecting all utilities.

As I understand it, my part in this discussion is not to duplicate the report of the Standing Committee but to attempt to supplement that report by directing attention to, and in some instances amplifying, the matters touched on in the report as they relate specifically to communications utilities.

Before doing so I would like to refer to the matter of conflict between state and Federal regulation. The report of the Standing Committee mentions cases in the gas and electric field which involve this issue. In my opinion, this issue is becoming of increasing importance in the field of communications law. We have already experienced the issue in a number of instances such as accounting, determination of annual depreciation rates, substitution of exchange service for a former toll service, etc., and I suggest that we will see further conflict in such matters as separations of property, revenues, and expenses and regulations affecting the use of facilities for unlawful purposes, both of these subjects being mentioned in this paper.

Rate Base—"Fair Value"

PRIOR to the decision in the Hope Case[1] there had been considerable dissatisfaction on the part of regulatory commissions as to the necessity of finding a "fair value" rate base and of considering reproduction cost as material evidence in the determination of a rate base. After the decision in the Hope Case, claims were made that reproduction cost evidence and the "fair value" concept of a rate base were outlawed and that commissions were free to follow any course they desired so long as the "end result" might be justified in some way.[2]

In the present generation of rate cases since World War II, a great deal of reliance has been placed on an "original cost" rate base, but there have also been a number of guideposts to indicate that thoughtful commissioners are becoming concerned with the financial and economic results flowing from a fixed policy of using such an "original cost" rate base.[3]

The inflationary effects of the present economic conditions are being increasingly reflected in utility operations and likewise questions of rate base, rate of return, and depreciation practices are becoming increasingly important in the utilities' efforts to meet customer requirements for service, to provide additional plant for adequate service, and to obtain a reasonable return for its investors. This problem is one affecting all utilities, but my comments are directed to the developments as disclosed by the telephone rate cases decided during the past year.

IN Illinois Bell Teleph. Co. *v.* Illinois Commerce Commission, the decision of the Illinois Supreme Court on the company's appeal brought to an end telephone rate proceedings of over two years' duration.[4] One of the primary issues involved in this appeal was whether the commission had the authority to fix utility rates without giving effective consideration to current economic conditions, and specifically to current price levels and current earnings

of other enterprises. The court rejected this contention of the commission, holding that the commission must take into account "current economic conditions, present price levels, and reproduction costs" and should make findings to enable the court intelligently to review the order.

However, the court stated that it would not dictate any precise formula so long as the factors mentioned were taken into account. The court reviewed the development of the "present fair value" basis of rate making in Illinois and pointed out that it had held on many occasions that the determination of just and reasonable rates depended on the present fair value of the utility's property.[5] The court rejected the contention that the Hope Case constituted a precedent for the commission's action in using a "value of investment" (*i.e.*, "net investment") rate base or for the court to depart from its established holdings and held that the decision in the Hope Case was consistent with the court's language as to rate of return.[6]

In *Re* Mountain States Teleph. & Teleg. Co. (June 19, 1953), the New Mexico commission in determining the rate base took into consideration book cost data and evidence of reproduction cost, as well as existing economic conditions, stating that it had made every effort to arrive at a rate base reflecting "true value upon a going level that will be useful over the years in properly allowing the company a reasonable rate of return." In its opinion the commission gave recognition to the fact that a large amount of plant had been constructed since the end of World War II and reflected the effect of the postwar construction costs, thus tending to reduce the gap between "original cost" and "reproduction cost" saying:

> The commission, in taking this into consideration, does not wish to penalize the company by considering book cost alone, but desires to give consideration to reproduction cost of the company's plant which has not enjoyed the same percentage growth in the recent years.[7]

In Chesapeake & P. Teleph. Co. *v.* Public Service Commission, one of the principal issues was whether or not a "fair value" rate base was required under the Maryland law.[8] The Maryland Court of Appeals held that the commission was required to use a "fair value" rate base in determining rates and pointed out that both the commission and the lower court had recognized that the "fair value" concept was applicable by reason of the statutory provisions.[9]

It has been argued that the decision in the Hope Case had relieved the commission from the necessity of finding a "fair value" rate base but the court of appeals pointed out that the Hope Case involved a Federal statute, saying:

> . . . we think the test of fair value is explicit in the Maryland statute, as construed by this court. . . . Whether it is implicit in the Maryland, as distinguished from the Federal, Constitution, is a question we need not and do not now consider.

As a result of this decision, the Maryland legislature in January, 1953, considered a number of bills introduced to amend the statutory provisions so as to prescribe a statutory requirement for "original cost" to be considered as the sole criterion of value. None of these bills were enacted.

In New England Teleph. & Teleg. Co. *v.* Public Utilities Commission, the Maine Supreme Judicial Court reversed an order of the Maine commission on the ground (*inter alia*) that the commission was required to consider and could not ignore the standard of "fair value" rate base required by the Maine statute.[10]

The court discussed the development of the Maine regulatory law as set out in the statute and as interpreted by prior decisions and held that "fair value," for the purpose of fixing telephone rates by reference to a rate base, means ***present value*** and original cost is but one of the several criteria of such value; that evi-

dence of reproduction cost (less depreciation) was one of the major factors to be considered by the commission in determining rates; and that a finding by the commission of a rate base, not on fair value, but on the basis of net investment, was improper.

As a result of this decision, the Maine, 1953, legislature was asked to remove the statutory requirement of fair value, which had been in force for over forty years. After considering various proposals which had been advanced, the legislature enacted Chapter 377 (Public Laws 1953) which, while making three changes in the statute, constituted in effect a clarification and re-enactment of the existing law. The legislative changes may be shortly summarized as follows:

(a) R.S. *c.* 40, *s.* 16, was amended to provide that rates should be "just and reasonable" in lieu of the prior provision that rates should be reasonable and just taking into consideration a fair return on fair value.

(b) R.S. *c.* 40, *s.* 17, was revised in its entirety and in determining "just and reasonable rates" the commission is required to fix a reasonable value of the property after considering original cost, prudent acquisition cost to the utility, current value, and "any other factors or evidence material and relevant thereto."[11]

It may be mentioned in passing that the 1953 Ohio legislature had presented to it various bills for changes in the existing mandatory requirement for a "fair value" rate base. In general the proposals took two separate forms: (a) a statutory elimination of the mandatory requirement, leaving to the commission a discretionary power to consider present value; and (b) a statutory provision that rates be fixed on the basis of "original cost" and not on present-day costs. None of these proposed changes were enacted by the legislature.

Separations

At the 1952 section meeting in San Francisco, Fletcher Rockwood discussed at some length the historical background and development of the present standard methods and procedures governing the allocation of property, revenues, and expenses to interstate operations on the one hand and to intrastate operations on the other. I do not believe that it is necessary within the limits of this paper to repeat the same story and that it will suffice to outline as simply as I can what the problem is.

All of you know that telephone facilities are used both in interstate telephone service and in intrastate telephone service and that substantially all of the telephone plant is used to furnish, and expenses are incurred in furnishing, a general telephone service whether within the confines of one state or in interstate and foreign communications.

Under our dual system of government, interstate and foreign telephone service is subject to the jurisdiction of the FCC while telephone service wholly within a state is subject to the jurisdiction of the state regulatory authority. The books of account kept under the Uniform System of Accounts prescribed for telephone companies do not require or provide for an allocation of property, revenues, and expenses as between interstate and intrastate operations. Thus, in telephone rate proceedings there is a problem of making special studies to determine the portions of the plant and expenses assignable to each of the two classes of business and the term "separations" has become a word of art to describe such studies and the methods and procedures by which such studies are made.

Other utilities may have problems involving allocations of costs in rate proceedings but a communications company engaged in furnishing both interstate service and intrastate service must make, for jurisdictional purposes, separations or allocations of costs as between the two classes of service.[12]

The latest development of standard separations procedures consists of the 1947 NARUC Separations Manual, as amended by the modifications commonly known as the 1951 "Charleston Plan."[13]

In his paper at the 1952 meeting, Mr. Rockwood furnished statistics as to the cases in which the standard procedures (as set out in the 1947 manual amended by the Charleston Plan) have been utilized.

I do not propose to burden you with similar statistics but would merely summarize by pointing out the interesting fact that since the 1951 Charleston Plan modifications were adopted by the FCC and recommended by the NARUC, there have been a large number of telephone rate cases decided in 43 states or subdivisions thereof. In 41 of these states the standard separations procedures (including the Charleston Plan) have been utilized to determine intrastate plant investment and intrastate expenses, though it is only fair to state that in eight of these states commissions have expressed more or less substantial criticism of the separations procedures as not going far enough in favor of intrastate operations.

HOWEVER, in only two of these states have the standard separations procedures been definitely rejected — West Virginia where under the state law the company has been unable to obtain a court review of the commission's action; and New Hampshire where the court recently sustained the commission's use of its own separations methods which constituted material changes in the standard procedures. In both of these cases substantial amounts of plant investment and annual expenses were excluded from intrastate operations and have been left in a "No Man's Land of no recovery" inasmuch as the FCC adoption of the standard procedures prevents their inclusion in interstate operations.

In Nevada, rate proceedings had extended over a period of three years and separations procedures constituted one of the principal issues. Such proceedings were terminated by the court decision in Bell Teleph. Co. of Nevada *v.* Public Service Commission, where the Nevada Supreme Court accepted and used the results obtained by application of the standard procedures but stated that such action did not foreclose future inquiry into this matter.[14]

THE Maine commission in *Re* New England Teleph. & Teleg. Co.[15] had adopted its own modifications of the 1947 Separations Manual and rejected the Charleston Plan modifications but, on appeal,[16] the Maine Supreme Judicial Court held that the commission had erred in so treating the issue of separations methods and reversed the commission's order. On remand the Maine commission, in compliance with the court's opinion, adopted the results obtained by application of the standard separations procedures.[17]

In New Hampshire, the state commission (with the chairman dissenting) adopted its own separations methods by modifying the procedures set out in the 1947 Separations Manual and entirely rejecting the Charleston Plan.[18] Upon appeal, the New Hampshire Supreme Court (with one judge dissenting) sustained the commission's action on the ground that there was evidence to support it.[19]

IN Washington Public Service Commission *v.* Pacific Teleph. & Teleg. Co. (May 6, 1953)[20] the Washington commission discussed criticisms of a utility consultant that the Charleston Plan modifications were arbitrary and do not give proper weight to certain factors which the consultant designated as "stand-by value" and "toll deterency" —somewhat similar points as had been made by the New Hampshire commission. The Washington commission pointed out that separations procedures were constantly under review for the purpose of correcting such inequities as appeared in application of such procedures, and said:

> The commission believes, even if the law would permit it (and of this we have grave doubt), that it would be foolhardy to prescribe a weighting factor designed to accomplish a certain end, even if justified under "stand-by use value," until the device had been tested and determined to be sound. Separations is a complicated subject

and treatment must be consistent throughout all phases. A factor developed on one phase might prove totally inappropriate for application to other phases. To be fair to all parties, a change in separations should be accomplished on a national scale and uniformly applied to intrastate and interstate alike.

Mr. Magill himself recognizes such to be the case for he states: "Unless a method is adopted which is applicable generally, there may develop a 'No Man's Land' of operations, in a sense, in which either the company or the subscriber, suffers discrimination." . . .

We will, of course, at all times consider recommendations for improvement in the manual but such recommendations must be substantiated in all their complex phases before we can substitute them for that which today represents the combined judgment of telephone men and regulatory men alike throughout the nation who have devoted considerable time and thought in studying the matter through thoroughly.

I DIRECT your particular attention to the sentence, "To be fair to all parties, a change in separations should be accomplished on a national scale and uniformly applied to intrastate and interstate alike." A review of the history of the development of separations procedures clearly shows that, from 1941 to date, there has been continuity of thought of both state and Federal people working on the problem that there should be uniform separations procedures uniformly applied.[21]

In the absence of "uniform methods uniformly applied" alike to state and interstate operations, telephone companies find themselves caught in a jam between Federal and state authorities. The use of different separations procedures by the two regulatory jurisdictions necessarily will produce different results which cannot be equitable to both the companies and their customers.

Throughout the development of the standard procedures, the position of the telephone companies has been consistent on the matter of uniform procedures uniformly applied. In 1941 in its petition to the FCC requesting that commission to prescribe separations methods and procedures, it was categorically stated that the Bell system companies would be willing to accept and apply any reasonable separations methods, based on relative use, so long as such methods were uniformly applied by Federal and state authorities in order that all the property and expenses would be allocated to one or the other of the two classes of operations and none would be left in a "No Man's Land." (See petition of Bell system filed in 1941 in FCC Docket 6328, "Separations Methods and Procedures," in which no decision has yet been handed down by the FCC.)

DESPITE the lack of final decision in Docket 6328 the FCC, on October 9, 1951, by formal minute, adopted the standard separations procedures as set out in the 1947 NARUC Separations Manual as modified by the Charleston Plan. The FCC utilized the standard procedures in deciding the Interstate Toll Rate Case,[22] and since March, 1952, these standard procedures have been in current use for settlements under contracts for division of interstate revenues among the Bell system companies, such settlements being periodically audited by the FCC accountants in order to determine that proper procedures have been used.

If, when, and as the FCC does in fact formally prescribe separations procedures—whether as a result of a decision in Docket 6328 or otherwise — and if some state commissions are unwilling to accept and apply the separations procedures so prescribed, but adopt their own methods of separations, the company concerned will be faced with the necessity of resolving such a conflict between regulatory commissions.

EFFECT *of Separations Methods on Return*. One aspect of this problem of "uniform separations procedures uni-

formly applied" which appears to have been overlooked, relates to the determination of the proper rate of return to be applied to an intrastate rate base which has been determined by methods other than the standard separations procedures. Because the FCC has adopted and is using the standard procedures in its regulation of interstate telephone rates,[23] the investment and expenses excluded by a state commission cannot be allocated to interstate business and hence remain in a "No Man's Land" where the excluded expenses cannot be recovered and the excluded investment is not permitted to earn any return.

But in the development of evidence as to rate of return, based on cost of money to the company, witnesses necessarily utilize data developed from experience of the company as a whole, regardless of the fact that such experience relates to earnings provided by interstate and intrastate operations. If then a rate of return be determined by a state commission on the basis of such evidence of cost of money, and such a rate of return be applied to an intrastate rate base which specifically excludes some plant investment and annual expenses, it must be obvious that the company concerned will not be able to obtain the dollars of earnings to provide investors with the yield upon which the money witnesses have predicated their evidence as to rate of return.

Return—Earnings

THERE have been a few decisions which may be mentioned involving the allowable return to communications companies.[24]

In general, the "cost of capital" method has continued to be utilized, but nevertheless there remains a very considerable spread between percentage rates of return as developed by commission witnesses and as developed by company witnesses. While the fact may not so appear in the decisions, it appears to me that the real difference arises from the practice of commission witnesses of developing a "fair return"—that is, the lowest return which will escape the charge of confiscation—in contrast to the "reasonable return" which, in theory at least, commissions are supposed to determine—that is, a return within the zone of reasonableness. It is now axiomatic that within such zone of reasonableness the discretion or judgment of commissions is controlling and the trend of court decisions would indicate a reluctance to interfere with commission findings so long as the allowed return is sufficient to escape the charge of confiscation.[25]

In *Re* Charges for Marine Telegraph Service, the FCC pointed out that competition in the marine telegraph field, in and of itself, did not justify the unusually high return of 10 per cent for which the carrier contended, but recognizing that the industry was subject to risks not ordinarily present in other regulated industries, the FCC held that the nature and extent of the competition should be taken into consideration in determining the allowable return, and that rates should be established which would permit a sufficiently large segment of the industry (comprising a number of competing carriers) to operate on a profitable basis, so as to provide efficient world-wide service and assure to the public the benefits from competition.[26]

In *Re* Bell System TWX Rate Increases, the FCC refused to suspend a proposed schedule of increased rates for TWX service, estimated to produce a return on net investment "something in the neighborhood of 7 per cent," stating that it could not find that such a level of earnings was "beyond the bounds of reasonableness." However, the commission specifically stated that such a holding was not a precedent in other rate-making proceedings and was not to be construed as an indication of the proper level of earnings for other interstate services of the Bell system or of its over-all operations.[27]

ATTRITION *of Earnings.* At the 1952 meeting of this section, Fletcher Rockwood drew attention to the subject of "Attrition of Earnings"—which he defined as the wearing away or reduc-

tion of the rate of return, under a constant schedule of rates, as a result of economic forces which have been and still are operating in this postwar period. He also spelled out the various factors affecting utilities generally and also some which are peculiar to the telephone business.

It is all too true, as Mr. Rockwood pointed out, that the adverse changes in economic factors causing attrition have been one of the principal reasons for the frequency of telephone rate cases. It is also true, until some method is found of allowing for this attrition of earnings, that at no time will a telephone company be able to earn the predetermined rate of return which it is supposed to obtain from the rates prescribed.

GENERALLY speaking, there have been no decisions which meet this problem of attrition "head on." However, in a few cases the matter has been discussed and there has been some recognition of the need for remedial action.[28] While some efforts have been made to meet the problem by giving consideration to the effect of known factors which will affect future operations, commissions have been rightly concerned as to the weight to be given to factors which are reasonably expected to operate in the near future but whose precise effects cannot be determined at the time of closing the record in a particular proceeding.

This subject of "attrition" is closely allied with the matter of a "fair value" rate base and where such a rate base is utilized, some cushion may be provided to offset, at least in part, the inevitable attrition of earnings. Where, however, commissions are reluctant to depart from an "original cost" rate base, an allowance for attrition necessitates an adjustment of the rate of return or some pragmatic adjustment of the rate base, such as, for example, using the company's net investment as of the end of the latest available test period[29] or making some special allowance for the increased cost of construction of projects committed to the business.

IN *Re* Southwestern Bell Teleph. Co. (May 18, 1953), the Oklahoma Corporation Commission pointed out that for the second time the company had presented evidence showing the effect of "attrition of earnings" and stated that while it could not include in the rate base possible future construction expenditures, it would include in the net investment rate base some $15,000,000 (out of a total of $22,000,000 of the 1953 construction program), as this $15,000,000 represented projects under way or which had been approved and firm commitments made for their completion.

In *Re* Chesapeake & P. Teleph. Co., the District of Columbia commission discussed at some length this problem of attrition as well as the evidence which had been offered in relation thereto. Such evidence related to the present value of the property, the relationship of original cost depreciation to current cost depreciation, and the necessity of increasing the initial allowable rate of return.[30] The commission's own witness expressed his concern with the problem and suggested that the allowed rate of return should contain a "cushion" over cost of capital, his opinion being that a return between 6 per cent and 6.25 per cent on net investment would provide such a cushion. It was the commission's conclusion that the company should be allowed to charge rates estimated to produce slightly more than 6.25 per cent on the test year data.

IN *Re* Mountain States Teleph. & Teleg. Co.,[31] the Wyoming commission in recognition of the expected attrition, exercised its discretion to allow a return of 6.89 per cent, which was higher than the commission would have allowed under normal conditions.

This subject of attrition has been and continues to be of serious import to telephone companies, as well as to other utilities.

Moreover, there is growing concern as to desirability for protection of the past investor in the business as well as to the shorter view problem of attracting new capital.[32]

DEPRECIATION *Expense and Inflation.* Another phase of this general subject is the problem of the treatment of "original cost" depreciation expense and the level of recovery has been brought up in a few cases (see *e.g., Re* Chesapeake & P. Teleph. Co. (DC PUC, April 29, 1953)) and the subject of discussion in a number of published articles,[33] though one cannot point to decisions specifically recognizing the problem and making some allowance therefor.

At the present time there are proceedings pending before the House Ways and Means Committee for the purpose of considering possible changes in the income tax laws to allow for the economic exhaustion of capital as a result of the present method of computing depreciation expense on "original cost." At a hearing on July 22, 1953, there testified representatives of the telephone, electric light, and gas industries, as well as two accountants. It remains to be seen what may be done about this matter at the next session of Congress.

Appeal Procedure

RATE *Order Granting Partial Relief.* Most utility lawyers at one time or another have been faced with a problem where a commission's order grants only partial relief. May the utility accept the benefit of the partial relief and at the same time prosecute its appeal from the order? There have been a number of cases where such appeals have been taken but the issue has not been raised. In two recent telephone cases, the Maryland Court of Appeals and the Rhode Island Supreme Court have answered the above question in the affirmative, on the general basis that the utility is bound to observe the commission's order until such time as it may be suspended or set aside by competent authority.

In Chesapeake & P. Teleph. Co. *v.* Public Service Commission, the court held that in the absence of a stay by the commission or an injunction by the court, the company had no option but to make the ordered rates effective and was not put to an election.[34]

In New England Teleph. & Teleg. Co. *v.* Kennelly, the Rhode Island Supreme Court held that the company, which had filed and made effective a schedule of rates in compliance with the administrator's rate order authorizing a level of rates lower than sought by the company, was not estopped from prosecuting its appeal from the same order which had authorized the filing of such rates.[35]

RATE *Schedules Filed under Rate Order.* In Town of Charleston *v.* Kennelly, the towns of Charlestown and Westerly appealed from a rate order fixing rates for Westerly Automatic Telephone Company.[36] Following his usual procedure, the administrator first determined the amount of additional revenue to be allowed and ordered the company to submit for his approval a revised schedule to produce the revenue. After the new rates received his approval, he issued, without further hearings, a second order making them effective. The court held that there was no requirement for the administrator to hold a hearing on the revised schedules but suggested that it would be a better procedure to give objectors an opportunity to be heard on the new schedules, particularly where there might be objection to particular allocations of the increased revenue.

REHEARING *Because of Changed Conditions.* In New Jersey Bell Teleph. Co. *v.* Board of Public Utility Commissioners, the company claimed that the board erred in refusing a rehearing for the purpose of considering adverse changes in conditions since the closing of the record. (Under the New Jersey law an application for rehearing is not an essential step in completing an appeal.) The New Jersey Supreme Court held that a rehearing was not essential to due process and that it was not error for the board to refuse such rehearing, pointing out that the company, at any time, could have exercised its statutory right to file new rate schedules. One judge dissented and expressed the view that it was the board's duty to hear evi-

dence bearing on the adverse changes in economic conditions and that the initiation by the company of a new proceeding would have resulted in delay and further expense and was not in accordance with the accepted standards of economy and efficiency in the administrative process.[37]

Suspension of Order—Refund Stipulation. In New England Teleph. & Teleg. Co. *v.* Kennelly, the Rhode Island court held that an appeal by a customer from the administrator's rate order operated as a stay of the order, unless the company entered into a stipulation as to refunds in the event of the customer's appeal being successful.[38]

Service

ADEQUACY *of Service Furnished.* The requirement for reasonable adequate service has been written into most, if not all, of the regulatory statutes and commissions generally have authority to compel the furnishing of adequate service. While there have been some rate decisions which touch incidentally on this subject, the customary procedure has been to consider service apart from rates.

However, during the past year the Ohio commission saw fit to adopt a policy of establishing a definite relationship between rate increases and the quality of service furnished and made arrangements for "policing" the quality of service in rural areas.

In Elyria Teleph. Co. *v.* Public Utilities Commission, the Ohio Supreme Court reversed a commission order which authorized increased rates effective only *when* the company had installed new equipment and facilities to improve its service.[39] The court held that the commission having found existing rates to be inadequate, its action in conditioning increased rates on service improvement amounted to confiscation, saying:

> A utility to survive must receive a fair return on its property. Otherwise capital will not be attracted to furnish the funds for the new equipment needed to meet the demands of increased population and the consequential necessity for increased service. The commission's order as made has the effect of creating serious difficulties for the company. A situation is present where the company needs an increase in rates to attract capital to buy new equipment and to meet increased demands, and the commission says, in effect, "we will give you the new rates to attract the new capital to purchase new equipment when you show that you have installed the new equipment." Adoption of such an attitude would hamstring the utility.

IN *Re* Bucyrus Teleph. Co. (not reported) the Ohio commission on August 24, 1951, ordered that company to install new switchboard positions not later than January 1, 1952. The company failed to comply with the order and the commission recommended imposition of a penalty of $100 a day from August 6, 1952, until the additional equipment was placed in operation. The commission chairman commented:

> This order will serve as notice to the rural telephone companies of Ohio that this commission will not tolerate continued violation of its orders.

In addition the 1953 Ohio legislature amended the commission statute giving the commission substantially greater authority to deal with the matter of inadequate service, particularly as to permitting or directing another company to furnish service in an area inadequately served by a delinquent company, and as to the determination of adequacy of service and imposition of penalties.[40]

COMPETITION — *Public Interest.* In Lodi Teleph. Co. *v.* Public Service Commission, certain customers of Lodi Company had petitioned the commission for local service from Commonwealth Telephone Company, whose operations adjoined those of Lodi Company.[41] Both companies furnished service in an area in and around the town of West Point. The completion of a toll-free bridge had materially changed the community of interest of the petitioners. One of the prin-

cipal differences between service furnished by the respective companies was that Commonwealth furnished local service to the new community of interest center while Lodi service to the same center involved a toll charge.

The commission over a long period of time had held that the added cost of a toll charge, in itself, was not a valid reason for permitting a company to take away subscribers of the adjacent company, but the court pointed out that the commission appeared to have reversed its former policy. In this case the commission directed Commonwealth Company to furnish service to complainants and Lodi Company appealed. The Wisconsin Supreme Court sustained the commission's order on the ground that the matters involved were questions for the commission, which was the primary judge as to when competition was consistent or inconsistent with the public interest.[42]

In Federal Communications Commission *v.* RCA Communications, the U. S. Supreme Court pointed out that the case was the first in which the FCC authorization of duplicate radiotelegraph circuits had been challenged in the courts and presented an issue of primary importance in the authorization of such circuits.[43]

The case before the FCC arose on the application of Mackay Radio & Telegraph Company for authority to operate two new circuits to Portugal and Holland which would duplicate operations of RCAC which opposed the application. (The two circuits were in addition to already existing duplicate operations to 11 other international points.) In *Re* Application of Mackay Radio & Teleg. Co. the FCC had found that competition resulting from a grant of authority for duplication of facilities would not impair RCAC's ability to furnish adequate service and that Mackay's proposed service would be adequate and would not require substantial new investment. The commission concluded that competition was reasonably feasible and the duplicate facilities should be authorized because of the "national policy in favor of competition."[44]

On appeal of RCAC, the District of Columbia Circuit Court of Appeals (with one judge dissenting) reversed the FCC order on the ground that an applicant must demonstrate, as Mackay had failed to do, that beneficial results to the public would be derived from the authorization.[45]

Certiorari was granted by the United States Supreme Court and that court held that the FCC did not have unbounded discretion but must be guided by "public interest, convenience, and necessity"; that FCC had relied on its interpretation of "national policy" and not on its own evaluation of the needs of the industry, which would have provided a different foundation for its order; and that the comprehensive scheme of regulation set up by the Communications Act contradicted the notion that national policy unqualifiedly favored competition. The court stated that in reaching a conclusion competition was reasonably feasible and duplicate authorizations were in the public interest, the commission was not required to make specific findings of tangible benefits, though it should make findings that competition would serve some useful purpose such as maintaining good service or improving the service. The court remanded the case to the FCC "for such disposition as is open under this opinion."[46]

In *Re* Western Union Teleg. Co.—Physical Connection and through Routes for Intercity Video Transmission Service—Western Union sought physical connection of its video transmission channels with those of the Bell system companies.[47] In its decision the FCC rejected Western Union's claim that lack of competition in this particular field constituted sufficient basis for ordering physical connection and held that a reasonable proposal to establish competitive facilities on an interconnected basis in the public interest had not been made on the record. The commission held that while it was obliged to consider national policy of competition, such factor must

be considered in the light of all the things making up "public interest" and standing alone the "national policy of competition" should not be given significant weight justifying a compulsory interconnection of facilities. One commissioner dissented (with another commissioner concurring in the dissent) on the ground that the decision permitted the establishment of a Bell system monopoly directly contrary to "the national policy favoring competition, its preservation and encouragement" and referred to the FCC decision in the RCAC-Mackay Radiotelegraph Case mentioned above.[48]

In *Re* Allocation of Frequencies—Theatre TV Service, the FCC affirmed earlier conclusions that the transmission of theatre TV programs should be a "common carrier" service; held that it had not been shown that common carrier frequency allocations would be made inadequate by the demands of such service; and refused to make any separate exclusive allocation of frequencies.[49] The commission pointed out that if a common carrier desired to limit its service offering to the specialized theatre TV programs, the commission in considering its application for use of frequencies would necessarily consider the limitations on use, the customers to be served, the adequacy and economy of the proposed service, the availability of existing common carrier service, and the prospective benefits to the public.

The proponents of theatre TV service also asked for an advance statement of policy on interconnection of facilities of a specialized common carrier with facilities of a general common carrier but the commission held that such a question would more appropriately be decided, if and when it should arise, on a specific petition for physical connection.

Unlawful *Use of Communications Facilities and Service.* The prevention of use of communications facilities for or in connection with gambling and other unlawful activities has long been a matter of serious concern to communications companies. The problem involves consideration of the companies' obligation to furnish service without discrimination, the protection of the companies and their employees from damage suits and criminal charges, while at the same time avoiding interference with law enforcement. While the companies are faced with this problem in their day-to-day operations, governmental and regulatory action generally has been sporadic, usually being tied in with Federal or state crime investigations.[50]

In Florida *v.* Ucciferri, the Florida Supreme Court upheld the validity of a state statute prohibiting transmittal of results of a horse race within thirty minutes of the posting of the results.[51]

In Fairchild *v.* Schanke et al., the Indiana Supreme Court considered the state antigambling statute (Hasbrook Law) fashioned after the ABA Model Anti-Gambling Act. (See footnote 48.[52]) However, the Hasbrook Law provided (§ 2(8)) for the exclusion of "*bona fide* religious, patriotic, charitable, or fraternal clubs" and the court held that this provision constituted an arbitrary and invalid classification in contravention of the Indiana Constitution, Art 1, § 23.[53]

Telephone *Facilities and Service.* In the past decade or so, telephone companies have sought to protect themselves from damages and criminal liability by tariff provisions which, as a condition of rendering service, prohibit use of their facilities for unlawful purposes and permit the companies to refuse or terminate service upon request of a responsible law enforcement authority.

The tariff provision generally in effect is substantially in the form as follows:

> Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the telephone company receives other evidence that such service is being or will be so used.

Such a tariff provision has been sus-

tained as reasonable by a number of state commissions and was considered a valid interstate regulation until the FCC ordered cancellation of the second sentence, leaving only the first sentence in the interstate tariff regulation.[54]

THE proceedings in the Katz Case had their inception in the action of the District of Columbia law enforcement authorities in 1949, requesting the local telephone company to discontinue service to over 300 telephones on the grounds that the telephones were allegedly used for gambling purposes. Katz, one of the customers affected, filed a complaint with the District of Columbia Public Utilities Commission, claiming that the company acted arbitrarily in threatening to remove his service and that the tariff regulation was unreasonable. That commission dismissed the complaint but required the telephone company to amend its tariff to provide for advance notice of the proposed termination of service (which in practice was the method followed by the company).[55]

On an application for an injunction the court ruled that the tariff provision should be revised to provide for a "fair hearing" and "competent evidence" of unlawful use.[56]

THEREAFTER Katz filed his complaint with the FCC claiming that the provision in the company's interstate tariff was unreasonable and unlawful. The FCC (with Commissioner Walker dissenting) ordered cancellation of the second sentence, as mentioned *supra*.[57] Subsequently the companies filed an application for reconsideration and dismissal of complaint or, in the alternative, that an amended tariff provision be approved, covering in substance the following points:

(a) refusal of service where the company has probable cause to believe the service is or will be used for unlawful purposes; advice from a law enforcement agency to constitute probable cause;

(b) advance notice to be given customer of company's proposed discontinuance of service;

(c) right of a customer to a court or commission determination whether or not service be furnished would not be prejudiced by the tariff regulation or by action thereunder.

The companies further asked that, if the FCC found both the existing tariff and the proposed tariff unacceptable, all references to illegal use be stricken from the interstate tariffs, leaving the matter to state and local authorities.

On March 20, 1953, the FCC issued its decision denying the rehearing holding that all the proposals advanced by the telephone companies were without merit, and ordering tariffs to be filed in compliance with its prior order of December 21, 1951.[58]

THESE decisions of the FCC relate to the interstate tariffs but recent decisions of state commissions continue to sustain the regulation in the intrastate tariff.

In Vacchiano *v.* New Jersey Bell Teleph. Co. the New Jersey board, on complaint of a convicted bookmaker who had served his sentence, refused to compel restoral of his service (discontinued in 1948) in the absence of an assent by the law enforcement agency.[59]

The Massachusetts Department of Public Utilities in Chick's Variety Store *v.* New England Teleph. & Teleg. Co.[60] and the Connecticut commission in *Re* Presmarita[61] specifically stated that these respective commissions could not agree with the majority opinion of the FCC in the Katz Case and expressed their view that, if a law enforcement agency had acted improperly, the customer's remedy was by way of complaint to a judicial body.

TELEGRAPH *Facilities and Service.* The Western Union Telegraph Company has been faced with a number of different phases of this problem.

In New Jersey *v.* Western Union Teleg. Co. and Frake the New Jersey Supreme Court sustained convictions of the company and the manager of its local

office for operating a common law disorderly house by accepting betting messages and issuing money orders for bets.[62]

In Michigan ex rel. Reading *v.* Western Union Teleg. Co., the Michigan Supreme Court held that, as the bets sent by wire from a telegraph office in Michigan were accepted outside the state, the complaint failed to state a cause of action under a statute authorizing abatement of nuisances in maintaining a place for gambling purposes.[63]

In *Re* Western Union Teleg. Co.[64] the company had proposed a tariff revision to include therein a new provision that the dissemination of horse- or dog-racing news over telegraph facilities, be limited to press associations, publications qualifying as second-class matter under Post Office regulations, to licensed radio stations, and to persons collecting or transmitting such news to the other stated classes.

The FCC ordered cancellation of the proposed tariff on the grounds that

(a) the proposed tariff provision would prevent legitimate users from obtaining service;

(b) responsibility for judging of the legitimacy of certain users would be controlled by the U. S. Post Office regulations relating to second-class matter;

(c) Western Union might be relieved of the responsibility to discontinue service under the tariff provision on file with state commissions.[65]

WIRE *Tapping — Evidence.* During the past year the courts again have had under consideration the question of evidence allegedly obtained by interception of telephone communications.

In On Lee *v.* U. S. involving a conviction on a narcotic charge, an undercover agent was "wired for sound" by means of a portable radio transmitter and conversations with the accused were picked up outside, being subsequently offered and admitted in evidence. The court held that the conduct of the Federal agents did not constitute unlawful search and seizure as is prescribed by the Fourth Amendment and there was no violation of § 605 of the Communications Act because there was no interference with any communication facility which the accused possessed or was entitled to use, nor was the accused sending any message so that there was no "wire tapping."[66]

In Schwartz *v.* State of Texas the U. S. Supreme Court followed its prior decisions that the Communications Act prohibition against "wire tapping" does not require a state court to exclude evidence obtained by wire tapping.[67] In the absence of a binding expression by Congress, the fact of wire tapping being a violation of a Federal statute is only one of the factors to be considered by a state in formulating its own rules for its own courts. Where a state has carefully legislated so as not to render inadmissible evidence obtained and divulged contrary to the Federal statute, the Supreme Court will not extend by implication the Federal prohibition and thereby invalidate specific language of the state statute.

IN U. S. *v.* Weinberg, 108 F Supp 567, the defendant, accused of perjury in testifying before the House Committee on Un-American Activities, filed a motion to suppress evidence alleged to have been obtained by interception of telephone communications.[68] The court pointed out that the matter of evidence by wire tapping had been a controversial theme in the courts in recent years but as a result of a number of decisions starting with the Nardone Case[69] there had been developed a clearer view of the law on the subject.

In the instant case, the court found that the defendant's affidavits set out mere suspicions and conjectures and did not allege that there was, in fact, any evidence to be offered by the government based on intercepted telephone messages. The defendant had the burden of proving to the trial court that wire tapping had been unlawfully employed in procuring evidence and only when that was done was the defendant entitled to an opportunity of showing that a substantial

portion of the case against him was dependent upon evidence thus unlawfully procured.

Conclusion

THIS paper has been difficult to keep within reasonable limits and yet be complete. In presenting it to the section, I have not discussed its contents in detail because I understand it is to be printed and distributed to members.

However, in conclusion let me say, if consideration of developments during the past twelve months is to be of value, I believe it is necessary to think of such developments in the light of the history of utility regulation at least over the past generation. Looking backward over thirty years of active practice in this field, almost a complete cycle of changes in the law may be observed. Reproduction cost as evidence of "fair value," the level of a reasonable return, and the level of a confiscatory return have all been and continue to be controversial subjects in rate proceedings.

Despite what some believe are the inherent weaknesses in proof of value, I believe that there was and is a sound legal and economic basis for the concept of a "fair value" rate base. It has taken two World wars, the Korean war, governmental management of the dollar, with their resultant inflationary effect on economic conditions, to bring a realization that "value" for any purpose is a term relating to current dollars, while "original cost" as used in prescribed accounting systems—"aboriginal cost" describes it more correctly—does not present a true picture of a utility's financial status.

IN January, 1944, the United States Supreme Court handed down its decision in the well-known and oft-referred to Hope Case[70] in which there were 70 pages setting forth five separate opinions. I suggest that these opinions as well as the history of rate regulation before and after this decision clearly show that there is no easy way of dealing with the determination of reasonable utility rates under the severe adverse impact of changing economic conditions. The united efforts of commissions, utility lawyers, and management are all necessary if utilities are to have that eventual vigorous economic health so necessary if they are to be able to give the public better service at lower costs. Such a condition cannot be attained through a starvation diet.[71]

Footnotes

[1] Federal Power Commission *v.* Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR NS 193.

[2] As an illustration of the extent to which it has been sought to justify the "end result" without specific findings of rate base, etc.; see: *Re* New England Teleph. & Teleg. Co. (July 30, 1948) 30 NH PSC 266; reversed on appeal, New England Teleph. & Teleg. Co. *v.* State (1949) 95 NH 353, 78 PUR NS 67, 64 A2d 9.

[3] See address of the late John E. Benton, general solicitor, National Association of Railroad and Utilities Commissioners, in NARUC Report, 1945 annual convention, p. 321 *et seq.;* and remarks by NARUC president, Commissioner Miller (of Ohio) NARUC Report, 1950 annual convention, pp. 7, 8. See also article by Hon. John P. Randolph, then NARUC general solicitor, PUBLIC UTILITIES FORTNIGHTLY, July 3, 1952, Vol. L, No. 1, p. 3.

[4] (1953) 98 PUR NS 379, 111 NE2d 329. This decision is discussed at some length at pp. 104-5 of the report of the Standing Committee.

[5] Citing Peoples Gas Light & Coke Co. *v.* Slattery (1939) 31 PUR NS 193, 25 NE2d 482.

[6] On April 16, 1953, the Illinois commission entered its order making effective increased telephone rates pursuant to the court's decision. Also, in *Re* Peoples Gas Light & Coke Co. (1953) 99 PUR NS 361, the commission gave specific recognition to the court's decision in the Illinois Bell Case and applied the "fair value" concept in the determination of increased gas rates.

[7] The commission fixed a rate base which included an over-all increase of about 5 per cent over book (original) cost.

[8] (1952) 97 PUR NS 50, 93 A2d 249.

[9] *Re* Chesapeake & P. Teleph. Co. (1952) Md PSC, 93 PUR NS 215; Chesapeake & P. Teleph. Co. *v.* Public Service Commission (1952) 95 PUR NS 129; *cf:* Chicopee Mfg.

Co. *v.* Public Service Co. of N. H. (1953) 98 PUR NS 187, 93 A2d 820, 823-24.

[10] (1953) 98 PUR NS 326, 94 A2d 801.

[11] At the same time there was enacted a new section authorizing the supreme judicial court to review, modify, amend, or annul a commission rate order but only to the extent of the unlawfulness of such order; except that where confiscation is alleged or other violation of constitutional right is involved, the court is required to exercise its own independent judgment as to both law and facts—this latter provision being a statutory recognition of the Ben Avon doctrine.

[12] The United States Supreme Court in Smith *v.* Illinois Bell Teleph. Co. (1930) 282 US 133, 148-9, PUR1931A 1, pointed out that a separation between interstate and intrastate operations is "essential to the appropriate recognition of the competent governmental authority in each field of regulation."

[13] The Charleston Plan modifications were formally adopted by the FCC in October, 1951, and were applied in the FCC Interstate Rate Order of November 21, 1951 (Docket 9889). The NARUC recommended the use of these modified procedures in an unanimous resolution adopted at its 1951 Charleston convention. See NARUC Report, 1951 annual convention, pp. 211-12. In the past year the Charleston Plan modifications have been published by the NARUC as an addendum to its 1947 Manual.

[14] (1953) 98 PUR NS 273, 253 P2d 602.

[15] (1952) 94 PUR NS 65.

[16] New England Teleph. & Teleg. Co. *v.* Public Utilities Commission (1953) 98 PUR NS 326, 94 A2d 801.

[17] See *Re* New England Teleph. & Teleg. Co. Supplemental Decree No. 1, Me PUC, February 25, 1953.

[18] *Re* New England Teleph. & Teleg. Co. (1952) 97 PUR NS 410.

[19] New England Teleph. & Teleg. Co. *v.* State (NH 1953) 97 A2d 213. The evidence upon which the New Hampshire commission based its action involved substantially the same theories and the same type of evidence offered by the same engineering witness, which the Maine commission had adopted as the basis for its order which, as mentioned above, was reversed by the Maine court.

[20] 100 PUR NS ——.

[21] See Separations Manual, Foreword; NARUC Report, 1947 convention, p. 356; NARUC Report, 1951 convention, p. 211.

[22] FCC Docket 9889, November 21, 1951.

[23] See recitals in FCC "Interstate Toll Rate Order," Docket 9889, November 21, 1951.

[24] See 1953 report of Standing Committee for general discussion and notation of return allowed in various utility cases.

[25] See for example: Chesapeake & P. Teleph. Co. *v.* Public Service Commission (1952) 97 PUR NS 50, 93 A2d 249; New England Teleph. & Teleg. Co. *v.* State (1953) 99 PUR NS 111, 97 A2d 213; New Jersey Bell Teleph. Co. *v.* Board of Public Utility Commissioners (1953) 97 A2d 602; *cf:* Northern Nat. Gas Co. *v.* Federal Power Commission (CCA 8th, July 20, 1953) holding that 5.5 per cent for a gas company was not "just and reasonable."

[26] FCC Docket 9915, October 20, 1952.

[27] FCC Docket 53-378, June 30, 1953.

[28] See for example: (a) "A Restatement of Fundamentals of Utility Rate Making" by the late Hon. Harold A. Scragg, chairman, Pennsylvania Public Utility Commission, PUBLIC UTILITIES FORTNIGHTLY, September 11, 1952; (b) "Rate Making and Inflation," by Hon. John P. Randolph (then general solicitor, NARUC) PUBLIC UTILITIES FORTNIGHTLY, July 3, 1952; *cf:* addresses presented to this section at the 1951 meeting.

[29] Some decisions indicate disapproval of the use of "end of year" investment data. *Cf:* Chicopee Mfg. Co. *v.* Public Service Co. (1953) 98 PUR NS 187, 93 A2d 820, 828.

[30] (1953) 99 PUR NS 314. One of the witnesses for the company in the D. C. case was Jackson Martindell whose article "Inflation—What It Means to Utilities and Investors," appears in PUBLIC UTILITIES FORTNIGHTLY, issue of June 19, 1952.

[31] (1953) 97 PUR NS 114.

[32] Of interest in this connection is the address by Hon. Sinclair Weeks, Secretary of Commerce, May 28, 1953, at the meeting of the American Iron and Steel Institute, in which he stated that industry could be encouraged to advance more rapidly "by so wisely and fairly using the regulatory powers of government, that service industries will be placed in a position to plow back earnings, attract capital, expand facilities, and, through eventual vigorous economic health, be able to give the public better service at lower costs."

See also article by the late Hon. Harold A. Scragg referred to in footnote 28.

[33] (a) Address by Hon. Sinclair Weeks referred to in footnote 32; (b) "Provision for Capital Exhaustion under Changing Price Levels," by Arthur H. Dean, *Harvard Law Review*, June, 1952; (c) "Impact of Price Level Changes on Utility Depreciation Costs," by Paul Grady, PUBLIC UTILITIES FORTNIGHTLY, June 19 and July 3, 1952; (d) see, also, addresses presented to this section at the 1952 meeting; (e) see, also, "Recent Law Review Comments on Inflation and Regulation," PUBLIC UTILITIES FORTNIGHTLY, July 30, 1953, Vol. XLIX, No. 13, p. 828.

[34] (1952) 97 PUR NS 50, 93 A2d 249. The court cited decisions in which similar practice had been followed without challenge and specifically referred to Department of Public Utilities *v.* New England Teleph. & Teleg. Co. (Mandamus case) (1950) 82 PUR NS 142, 150, 90 NE2d 328, 333, which held the company could avail itself of a limited rate increase without abandoning its right to a court review of the validity of the order.

[35] (1953) 100 PUR NS 24, 95 A2d 886.

[36] (1953) 98 PUR NS 348.

[37] (1953) 97 A2d 602. *Cf:* Action of Maine

Supreme Judicial Court in New England Teleph. & Teleg. Co. *v.* Public Utilities Commission (1953) 98 PUR NS 326, 94 A2d 801—in remanding the case to the commission after invalidating the rate order because of errors, the court required the commission to render its revised decision on the existing record.

[38] (1953) 98 PUR NS 84, 94 A2d 253. *Cf:* Chicopee Mfg. Co. *v.* Public Service Co. (NH 1952) 96 PUR NS 189, 89 A2d 751.

[39] (1953) 98 PUR NS 246, 110 NE2d 59.

[40] See Ohio HB 134, approved July 27, 1953, amending and supplementing Code § 4905.

[41] (Wis 1952) 96 PUR NS 153, 55 NW2d 379.

[42] *Cf: Re* Iowa County Teleph. Co. (1953) 99 PUR NS 23, where one company was ordered to extend its service, even though the loss to the second company of customers would increase the economic difficulties of its small exchange.

[43] (1953) 346 US 86.

[44] FCC Docket 8777, February 21, 1951.

[45] R.C.A. Communications, Inc. *v.* Federal Communications Commission (1952) 98 PUR NS 390, 201 F2d 694. See 1953 report of Standing Committee, p. 59.

[46] Two Justices (Reed and Jackson) took no part in the decision. Justice Black thought the judgment of the court of appeals should be reversed and the FCC order affirmed. Justice Douglas was of opinion that there was no occasion for remand and the judgment below should be affirmed.

[47] FCC Docket 9539, October 13, 1952; rehearing denied March 23, 1953. The commission pointed out that though the proceeding in Docket 9539 had been initiated on the commission's own motion as a result of prior proceedings in Docket 8963 (which had not dealt with the matter of physical connection), Western Union and Bell system had taken adversary positions, Western Union advocating interconnection of common carrier facilities and the Bell system maintaining its general policy against connection of its facilities with those of others.

[48] The majority opinion of the FCC differs from the commission's reasoning in the RCAC-Mackay Case and appears to be more in line with the recent decision of the U. S. Supreme Court in that case. The dissenting opinion, of course, was written prior to the court decisions in the RCAC-Mackay Case.

[49] FCC Docket 9552, June 24, 1953.

[50] The ABA Commission on Organized Crime has proposed a model state Anti-Gambling Act. (See final report, September 2, 1952.) There are presently pending in Congress a number of bills to prohibit use of communications facilities to transmit results of horse or dog racing. Review of these Federal bills indicates desirability of clarification of language in order to avoid some practical difficulties and possible penalties in day-to-day running of the business.

[51] (1952) 61 So2d 374.

[52] (1953) 113 NE2d 159.

[53] The ABA Model Act does not provide for any such exclusion as contained in the Indiana law and the Indiana court did not purport to pass upon that form of statute stating that since the Hasbrook Law was invalid because of the arbitrary exclusion of the stated clubs, it was unnecessary for the court to consider any other question.

[54] Katz *v.* American Teleph. & Teleg. Co. et al. FCC Docket 9500 (1951) 92 PUR NS 1; rehearing denied March 20, 1953, 98 PUR NS 134.

[55] See Katz *v.* Chesapeake & P. Teleph. Co. (DC 1949) 80 PUR NS 76.

[56] Katz *v.* Flanagan, US Dist Ct, Dist of Col, CA 3787-49; not officially reported.

[57] Katz *v.* American Teleph. & Teleg. Co. et al (FCC 1951) 92 PUR NS 1.

[58] (1953) 98 PUR NS 134.

[59] (1953) 97 PUR NS 63. See similar decisions in Scance *v.* New Jersey Bell Teleph. Co. (1952) 95 PUR NS 16 and Toms *v.* New Jersey Bell Teleph. Co. (1953) 99 PUR NS 63.

[60] Chick's Variety Store *v.* New England Teleph. & Teleg. Co. (1953) 99 PUR NS 88. On June 16, 1953, complainant filed suit in superior court to restrain the company from discontinuing service. Court held that evidence submitted by the police was insufficient to show reasonable grounds to believe the telephone was used for unlawful purposes and granted injunction.

[61] (1952) 98 PUR NS 140.

[62] (1953) 97 A2d 480.

[63] (1953) 57 NW2d 537.

[64] FCC Docket 10,112, March 24, 1953.

[65] The examiner's proposed report had stated that the proposed tariff would not accomplish its avowed purpose of keeping horse and dog racing information out of the hands of bookmakers but the FCC did not find it necessary to pass on this point.

[66] (1952) 343 US 747, 72 SCt 967.

[67] (1952) 344 US 199, 73 SCt 232.

[68] (1952) 108 F Supp 567.

[69] Nardone *v.* US (1939) 308 US 338; 60 SCt 266.

[70] See footnote 1.

[71] See Address of Hon. Sinclair Weeks mentioned in footnote 32.

APPENDIX

Outstanding Developments during Past Year Affecting Air Carriers

By HAROLD L. RUSSELL*

ALTHOUGH a most serious problem within the scope of these remarks is what developments in the air carrier field are of sufficient significance to be of interest to such an august gathering of public utility lawyers as you who are here this afternoon, there have been a few developments which are of general interest and are worthy of your passing consideration.

As you may know, air carriers have been regulated from the economic standpoint for only fifteen years, or since the passage of the Civil Aeronautics Act of 1938. Consequently, and naturally enough, those interested in air carrier regulation have done much more looking to other fields of public utility regulation for precedents and developments than vice versa.

Further, and because of the basic economics of the business, air transportation is fundamentally interstate in character. Only in California, and particularly between San Francisco, Oakland, Los Angeles, and San Diego is there sufficient traffic to support intrastate operations without U. S. mail pay subsidy. And any operator which carries the mail is federally regulated. Therefore, Federal regulation, by the Civil Aeronautics Board pursuant to the act of 1938, is air transportation's primary concern and in that field are found the most significant developments of the past year.

IT should be noted also that for the first time since its creation in 1938, and as a result of an expression of public sentiment concurred in by almost all states except my good home state of Georgia and a few others last November, the Civil Aeronautics Board now has a Republican majority of three. Consequently, many believe and almost all hope, that the decisions of the CAB during the coming year will be of greater significance than those of the past fifteen years. Therefore, these remarks will go slightly beyond the title and in addition to past developments will note significant trends which should be of interest to you whose principal interest is in other fields of public utility regulation.

Turning first to the field of commercial rates, the board, by a vote of 3 to 2, on May 14, 1953, dismissed a general passenger fare investigation in response to motions to dismiss filed by almost all the respondents who were all of the so-called trunk-line air carriers.[1] That action came within sixty days after the third Republican was appointed to the board. It was a most refreshing decision since the investigation, then pending for almost a year, threatened a reduction in the general fare level at a time when air carriers were, and still are, faced with rising costs and unprecedented capital requirements. It is believed that the air carriers are unique among public utilities in that fare levels now are generally at the 1940 level and in that their current problem has been to hold fares at that level and forestall reductions, while almost all other utilities are seeking, and securing, rate increases.

THE reasons given by the board for dismissing the fare investigation are most interesting and perhaps may be helpful in other fields:

1. First, the board found that the reasonableness of fares should not be considered upon a short-run basis and that, since 1938, the industry as a whole had shown an average return on investment of 8.3 per cent after taxes.

2. Secondly, the board found that the expected early settlement of the Korean

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[1] General Passenger Fare Investigation, CAB Docket 5509, *Commerce Clearing House Aviation Law Reports* 21,592.

war would result in a decrease in the traffic attributable to that emergency.

3. Thirdly, the board stated that it expected significant increases in air-coach services, which are operated at fares 25 to 33 per cent below first-class fares, and which reduce the return per passenger mile. (Parenthetically, it is significant that no air carrier has, since the order dismissing the investigation, announced any geographical expansion of its air-coach services.)

4. Fourthly, and as a corollary to its examination of earnings since 1938, the board said that "should earnings fall markedly in the future the carriers will be expected to absorb such losses without resort to fare or mail rate adjustments unless it can be demonstrated that such earnings are below the level necessary to provide a fair return over a reasonably extended period which includes the good years as well as the bad."

5. Finally, and probably out of deference to the views of the two vigorously dissenting Democrats on the board, the majority ordered an informal staff investigation of fares which is to be completed within the next six months and which may result in further formal proceedings.

THAT decision of the board is also interesting from the standpoint of what the board did not say. Those of you in the motorbus and truck, and street railway, fields are well acquainted with the operating ratio standard for appraising the reasonableness of earnings and the fixing of rates. Air carriers, like motor carriers, have a very high capital turnover, and revenues generally exceed 150 per cent of investment on an annual basis. Since this was the first passenger fare investigation of the CAB to reach the exhibit stage—the motions to dismiss were filed between the time set for affirmative exhibits and that set for rebuttal exhibits — most of the carriers urged the board to use the operating ratio standard and dismiss the investigation upon the ground that the industry operating ratio, the ratio of expenses to revenues, was, as it is now, approximately 90 before taxes. The carriers were disappointed that the board did not even mention that factor in its decision. However, the carriers have been asked by the board to confer with the board's staff in the staff's informal study and will continue to try to "sell" the operating ratio standard to the staff and to the board.

THE rate situation for the future is most uncertain. Most of the carriers have tremendous equipment commitments. There has already been a noticeable lag in the increase in the travel market. Although traffic has increased, that increase has not kept pace with increases in expenses or increased capacity. It seems probable that within the next six months the carriers will be at an economic crossroads. Some will want to increase fares to meet rising costs; others, particularly those now greatly increasing their capacities, will want to expand low fare services to create greater traffic volumes and total revenues. The air transportation industry is so highly competitive that a change in fares by one carrier necessarily affects all carriers from coast to coast.

It seems probable that since fare reductions are popular those who will seek expansion of low fare services will prevail and that the economic stresses of the times will make moot the board's informal staff study of fares before it is completed.

THERE have been no significant developments in the air cargo rate field in the past year. In the field of mail rates, as opposed to commercial rates, there have been several developments, rather widely publicized, which are worthy of mention because of that publicity, although they may have little real substantive effect.

The first of those relates to the payment of mail subsidy. As you may know, § 406 of the Civil Aeronautics Act provides that the CAB is to set mail rates for air carriers in an amount sufficient

to enable the carrier "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense"—to use the statutory language. In practice, this has meant that the CAB has computed the difference between commercial revenues and expenses and set the mail rate at an amount which will cover that difference and return a reasonable profit.

About two-thirds of the trunk-line carriers, carrying over 90 per cent of the domestic mail, however, have profitable operations exclusive of mail pay and receive subsidy-free, so-called service, rates for carrying the mail. About a year ago the CAB issued an administrative determination of service mail pay for all carriers by groups. As a result of Presidential Reorganization Plan No. 10 of 1953, the Post Office in the future will pay the carriers only the service rate, as determined by the CAB, and any subsidy payments will be made by the CAB. Formerly, the CAB simply set the rate and the Post Office paid through its appropriations.

The Post Office under the new administration is commendably determined that its operations shall reflect black ink. The new change will help in that direction. Its effect upon subsidized air carriers, which are the local service carriers and a handful of the regional trunk-line carriers, cannot be measured until it is seen whether Congress will respond as readily to CAB requests for subsidy for those carriers as it has in the past to similar requests of the Post Office Department. However, in view of the wide geographical coverage of the affected carriers, and the probable reluctance of even an economy-minded legislator to reduce air transportation services in his own state, it is not believed that the change will be of any great significance.

In two rather widely publicized recent decisions of the court of appeals of the District of Columbia, that court has invalidated two CAB mail rate orders.[2] In the first the board had said that, in setting mail rates for a carrier's foreign operations, it would not consider the profits earned on the carrier's domestic system. In the second the board said that in setting rates for a domestic operation it would not consider profit earned by a carrier on the sale of a route authorization, which was an intangible. In the first case, the board said it would not offset domestic route profits against foreign route losses because that would destroy the incentive of the carrier to develop its domestic routes; and, in the second, the board found that to offset profits on the sale of routes against mail pay needs would stifle desirable mergers and acquisitions. The court of appeals found that the board was required by statute to consider the needs of the system of a carrier as a whole and its revenues from all sources in determining a carrier's mail pay needs.

Certiorari is being sought in both cases, and if the Supreme Court should reverse the court of appeals and affirm the CAB decisions, it will be a high-water mark in liberal interpretation of the statutory powers of a regulatory agency.

From the carriers' standpoint, the situation is most unfortunate since by simple findings that the carriers needed all the revenues involved to fulfill the statutory objectives — findings made by the board in intent but not in so many words — the board's decisions would have been beyond attack.

Turning from the field of rates to that of franchises, or new routes, there has been only one decision by the CAB of any particular significance in the past year. Western Air Lines was granted an important new route between Minneapolis-St. Paul and the West coast in the so-called Salt Lake City-Rapid

[2] Summerfield *v.* Civil Aeronautics Board and Western Air *v.* Civil Aeronautics Board, *Commerce Clearing House Aviation Law Reports* 18,168, May 4, 1953; Summerfield *v.* Civil Aeronautics Board, same, 18,173.

City Extension Case.[3] At first glance that case might appear to represent a reversal of the board's policy announced in January, 1951,[4] that satisfaction of the statutory requirements for route expansion in the domestic trunk-line system "would place a difficult, if not insurmountable, burden upon the air carriers who would undertake to sponsor further route expansions of any substantial character." However, in the Western Case, the Department of Defense had made strong representations as to the needs of the national defense for the proposed service. Under the circumstances, it is believed that case represents no precedent for the future.

It is interesting to note that the carriers are embarking upon another round of large new route proceedings, similar to that of the 1945-47 period. As long-pending applications come to hearing, carriers seek to have consolidated for hearing and decision other pending applications, alleging mutual exclusivity of the applications and invoking the doctrine of the Supreme Court decision in Ashbacker Radio Corp. *v.* Federal Communications Commission,[5] as refined by the court of appeals for the District of Columbia in Northwest Airlines *v.* Civil Aeronautics Board[6] to the effect that mutually exclusive applications require concurrent consideration. In these forthcoming cases the board's policy with respect to new route grants will be reexamined. Whether or not it will be modified will depend upon the economic temperature prevailing at the time of the decisions, and the strength of the board's determination to avoid excessive competition.

No discussion is complete without brief mention of mergers. During the past year, the board's four-year-old policy of encouraging mergers and consolidations in the interest of greater economy and efficiency and reduction in mail pay requirements has finally borne fruit, and the number of trunk-line carriers has been reduced from 16 to 13. A pending case is expected to reduce that number further to a total of 12. There has also been one merger of two local service lines. By and large, the board has been disposed to approve promptly any merger or other consolidation of air carriers which offered (1) reasonable integration from the standpoint of traffic and operations, (2) the prospect of decreased expenses and increased revenues, and (3) the prospect of reduced mail pay.

There is one final case which should be mentioned. Unlike other carriers, the airlines have had a "Bulwinkle Bill" since 1938. Section 412 of the Civil Aeronautics Act requires carriers to file with the board all intercarrier agreements and § 414 provides immunity from the antitrust laws and from "all other restraints or prohibitions made by, or imposed under, authority of law, in so far as may be necessary to enable such person [a carrier] to do anything authorized, approved, or required" by any order approving an agreement filed under § 412 of the act. In Putnam *v.* Air Transport Asso. of America, decided June 2, 1953,[7] by the U. S. District Court for the Southern District of New York, a suit by a travel agent alleging antitrust violations and breach of contract as a result of his having been discharged as an agent by group action of the airlines was dismissed on motion for summary judgment which set out that the action taken was pursuant to an intercarrier agreement filed with, and approved by, the CAB under § 412 of the act. The case will not be appealed and is the first case of its kind. It may be helpful in other fields.

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[3] September 25, 1952; *Commerce Clearing House Aviation Law Reports* 16,575.

[4] Southern Service to the West Coast, *Commerce Clearing House Aviation Law Reports* 21,350.

[5] 326 US 327, 61 PUR NS 466, 66 SCt 148.

[6] (1952) 90 US App DC 158, 194 F2d 339, *Commerce Clearing House Aviation Law Reports* 17,815.

[7] 112 F Supp 885, *Commerce Clearing House Aviation Law Reports* 18,225.

APPENDIX

Developments in Railroad Law during the Past Year

By WILLIAM I. WOODCOCK, JR.*

IN discussing within the time allotted me developments in railroad law during the past year, I shall confine my remarks to (1) certain amendments made or proposed to the Interstate Commerce Act and (2) several significant decisions of the Supreme Court of the United States affecting the railroads.

While many bills pertaining directly to the railroads were considered by the 82nd Congress, only one was enacted. This was Public Law 556, approved July 16, 1952, which added § 20c to Part I of the Interstate Commerce Act. This new section authorizes equipment trust, conditional sale, and like contracts used to finance the acquisition of railroad equipment, to be filed with the Interstate Commerce Commission, and provides that such recordation shall eliminate the necessity of filing such contracts under any other law, Federal, state, or local. Since most railroad equipment is acquired through equipment trusts or conditional sales and as many of the railroads operate in a large number of states, this provision serves a good purpose and is being generally used.

There have been a number of bills introduced at the 83rd session of Congress which would affect rail transportation. I should like to comment briefly upon two pending bills, which have been reported favorably by the Senate Committee on Interstate and Foreign Commerce and probably will be voted upon when Congress reconvenes in January. One of these bills—S 1461—is intended to expedite action by the Interstate Commerce Commission on applications for general rate increases; the other bill—S 281—would grant the commission authority over discontinuance of certain railroad services.

ONE of the most serious problems confronting both the railroads and other public utilities in the inflationary postwar period has been securing authority to make rate increases adequate to meet increased wages and the rising cost of materials and supplies. While the Interstate Commerce Commission finally authorized in large part the increases the railroads sought for this purpose, the long delay in granting this authority seriously handicapped the railroads in meeting the impact of increased operating costs.

In fact, it has been estimated that during the years 1946 to 1952 the railroads would have received additional gross revenues of approximately $1.3 billion if the rate increases which finally were approved by the commission, could have been made effective thirty days after the filing of the petitions seeking the increases.

Recognizing the injustice of this "time lag," the Senate committee on June 1, 1953, recommended the enactment of S 1461 which would add to the Interstate Commerce Act a new section, to be known as 15b, dealing with petitions for such increases and limiting the time within which the commission shall act thereon.

THIS new section would provide that whenever any common carriers subject to the act, acting by regional or other groups, shall file a petition with the commission certifying that they have incurred, or within the immediate future will incur, increases in wages or in the cost of materials and supplies which, according to the best available estimates of revenues and expenses for the 12-month period following the filing of such petition, indicate that a general rate increase is necessary to permit the carriers under honest, economical, and efficient management to earn sufficient revenues to provide adequate and efficient service, establish and maintain sound credit, attract equity capital, and

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protect the public interest, the commission shall, within sixty days after the filing of such petition, enter an interim order, with or without a hearing, authorizing increases, if any, which the commission deems appropriate or necessary for such purpose. These increases would become effective upon ten days' notice. Within sixty days thereafter the increases proposed by the carriers shall be the subject of further investigation.

If, upon final disposition of the issues, the increases granted by the commission in any case are less than the increases made under the interim order, the carriers shall, subject to rules and regulations prescribed by the commission, make refunds in the amount by which the interim rate collected exceeds the rate finally approved.

Bill S 1461 was proposed by the National Industrial Traffic League, a shippers' organization, and differs in some respects from the "time lag" bill which the railroads had supported before the 82nd Congress. The railroads, however, at the present session of Congress have vigorously supported S 1461, as we believe it will go a long way toward improving the existing situation. In this connection, the bill would not only require the commission to enter an interim order within sixty days, but it also would set up standards of adequacy which the interim rates should meet. This latter feature is of great importance in solving the "time lag" problem, since interim increases which the commission has allowed in the past have been inadequate and often substantially less than the increases finally authorized.

The other bill to which I wish to refer —S 281—was the subject of a report made on July 9th in which the Senate committee recommended its enactment. This bill would amend § 13 of the Interstate Commerce Act so as to give the Interstate Commerce Commission the power to order the discontinuance of freight, passenger, or station services in intrastate commerce if it finds that the continuance thereof unduly discriminates against, or places an undue burden on, interstate commerce.

While the Interstate Commerce Commission has had for many years authority to authorize the abandonment of a line of railroad, and also the power to fix intrastate rates in order to remove discrimination against interstate commerce, it has had no power to authorize the discontinuance of intrastate passenger, freight, or station services. As a result, the railroads have not infrequently been required by state commissions to continue to operate intrastate trains at substantial losses, which must be made up by revenues from interstate traffic. The bill would not deprive the state commissions of initial jurisdiction over intrastate service, but would afford the carriers a forum which could overrule the state commissions if it found that their action resulted in an undue burden on interstate commerce.

The decisions of the Supreme Court which I shall discuss are: (1) Baltimore & Ohio Railroad Co. *v.* United States (1953) 345 US 146, 99 PUR NS 434, which involved the question of confiscation; (2) King et al. *v.* United States (1952) 344 US 254, which involved the validity of an Interstate Commerce Commission order prescribing intrastate rates in Florida; and (3) American Trucking Associations *v.* United States (1953) 344 US 298, 98 PUR NS 358, which involved the commission's power to regulate the leasing of trucks to certificated motor carriers.

The decision rendered March 16, 1953, in Baltimore & Ohio Railroad Co. *v.* United States is of interest not only to the railroads, but to other utilities as well. The plaintiff railroads brought an action in the United States District Court to set aside as "confiscatory" an order of the Interstate Commerce Commission which prescribed maximum reasonable carload rates on certain kinds of fresh vegetables from points in Texas to many other states. After the commission had prescribed the rates, the railroads asked to reopen the proceeding so that they

could introduce evidence to show that the rates prescribed would produce less money than it would cost to transport the traffic. The commission refused to permit the introduction of this evidence. The district court dismissed the railroads' complaint on the ground that they had not raised the issue of confiscation until after the entry of the commission's order. The Supreme Court affirmed the judgment not on the ground relied upon by the district court, but on the ground that even if the railroads proved that the cost of handling the traffic exceeded the rates prescribed, this would not justify invalidation of the commission's order.

In the majority opinion, Mr. Justice Black said that so long as the railroads are not caused by an order of the commission to lose money on their over-all business, it cannot be considered that their property is taken for public use "without just compensation." The court further held that the prescription of rates on a particular commodity on a basis less than the cost of transporting that commodity was not unreasonable or arbitrary so as to make it violative of the due process provision of the Fifth Amendment.

In this connection, Justice Black stated "so long as rates as a whole afford railroads just compensation for their over-all services to the public the due process clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served."

Mr. Justice Douglas filed a dissenting opinion concurred in by the Chief Justice. Justice Douglas expressed the view that a rate which is conceded to be confiscatory cannot be considered to be reasonable as that term is used in the Interstate Commerce Act, unless perhaps in instances where "dire emergencies" arise, making it necessary in the public interest to compel transportation of certain commodities at less than cost.

King *v.* United States, *supra*, decided December 22, 1952, involved the proof required to support an order of the Interstate Commerce Commission prescribing under § 13(4) of the Interstate Commerce Act intrastate rates on the same level as it had previously prescribed for interstate traffic.

The Florida state commission refused to permit the railroads to make effective on intrastate freight traffic the full increase which the Interstate Commerce Commission in a general rate case of national scope had prescribed for application in southern territory, including Florida. Thereafter the Interstate Commerce Commission ordered that the Florida intrastate rates be increased to amounts equal to such interstate rates. The Florida commission then filed a complaint in the United States District Court to enjoin the enforcement of the Interstate Commerce Commission's order. The complaint was dismissed by the district court and its judgment was affirmed by the Supreme Court of the United States.

The main issues raised in the case were (1) whether the Interstate Commerce Commission, in prescribing intrastate freight rates under § 13, can give weight to deficits in interstate passenger revenues, and (2) whether the commission's findings were sufficient to sustain the rates prescribed for intrastate application.

In the majority opinion, Mr. Justice Burton called attention to the change which has taken place from the original commission theory that passenger service must be self-supporting to the present concept that the rate structure of the country is to be considered as a whole in general rate cases in order to carry out the national transportation policy. He stated that this policy permeates proceedings such as general rate cases, from which the instant case arose, and leaves no ground for a claim that the commission may not give weight to passenger revenue deficits in prescribing interstate freight rates to meet over-all revenue needs.

He further stated that there was no

showing that operating conditions in Florida affecting intrastate passenger traffic differed substantially from those affecting interstate passenger traffic in southern territory generally and there is no reason why the commission may not give weight to passenger deficits in prescribing intrastate freight rates in Florida.

In holding that the commission's findings were sufficient to support the increased rates prescribed for intrastate application, the court went to some length in comparing the findings in the instant case with those in State of North Carolina *v.* United States,[1] in which the court enjoined the enforcement of a commission order prescribing an increase in intrastate passenger fares. In the instant case, while the commission found that the Florida rates were abnormally low and the transportation conditions in Florida are not more favorable—and in some respects less favorable—than in southern territory generally, it did not make the specific findings to which the court attached great importance in the North Carolina Case; namely, "what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" and "what amount of revenue was required to enable these railroads to operate efficiently."

In some respects it is difficult to reconcile the North Carolina and Florida cases. In this connection, it is interesting to note that only one of the Justices—Justice Jackson—joined in the majority opinion in both cases; Justice Black, who wrote the opinion in the North Carolina Case, and Justice Douglas, who concurred therein, both dissented from the decision in the Florida Case.

In my opinion the Florida Case is one of the significant decisions of the Supreme Court involving the railroads in recent years, since it shows that the court in a general revenue case will no longer require that a thirteenth section order of the commission be supported by all the specific findings which were deemed essential in the North Carolina Case. In fact, in a recent case in Montana, where the Federal court set aside an order of the Interstate Commerce Commission because it lacked the findings considered necessary in the North Carolina Case, the Supreme Court vacated the judgment and remanded the cause for further proceedings in the light of the decision in the Florida Case: Montana *v.* United States.[2]

The third and last case to which I wish to refer is American Trucking Associations *v.* United States, *supra,* decided January 12, 1953, in which the Supreme Court sustained an order of the Interstate Commerce Commission prescribing certain rules to govern the use by authorized motor carriers of equipment not owned by them but leased or obtained by them in interchange.

The most important purpose served by the regulations had to do with trip leases. A practice has grown up in the trucking industry under which a truck line authorized to operate as a common carrier leases trucks not owned by a certificated carrier, including the services of the driver, for a single one-way trip and agrees to pay the owner of the truck on the basis of a division of the rate.

In order to meet this situation, which resulted in unsafe and uneconomic practices, the commission prescribed rules which would require: (1) the lease to be in writing; (2) the term of the lease to be for more than thirty days when the driver is the owner or his employee; and (3) the compensation to the lessor to be stated in the lease and not to be measured by a percentage of the revenue received for the transportation service. These rules would not apply to the leasing of trucks by one certificated carrier to another certificated carrier for use in territory served by both carriers, nor would they apply to leasing of trucks to be used in the transportation of railway express

[1] (1945) 325 US 507, 60 PUR NS 72.

[2] (DC Mont 1952) 106 F Supp 786; 344 US 905.

traffic or in substituted motor-for-rail transportation of railroad freight.

THE issue in the case was whether the Interstate Commerce Commission had the implied power under the Motor Carrier Act (Part II of the Interstate Commerce Act) to control the leasing practices of truck lines. In the majority opinion, Justice Reed held that the commission, under its general power to enforce the act, had the implied power to regulate truck leasing even though the act contained no specific reference to leasing practices. In this connection, it was pointed out that the commission had found that such regulation was necessary since the so-called trip leasing made it difficult, if not impossible, to enforce safety regulations and to prescribe and maintain a proper rate structure. Justices Black and Douglas dissented on the ground that the commission did not have such implied power, stating that the leasing of trucks by motor carriers was a common practice prior to the passage of the Motor Carrier Act in 1935, and that Congress had made no attempt to change this practice or to regulate those who owned vehicles that were leased to regulated carriers.

The main contention in the dissenting opinion, however, was that the trip-leasing restrictions prescribed by the commission would have a serious and adverse effect on the exemption of the transportation of agricultural products from regulation by the commission, pointing out that it was a common practice for an exempt trucker who carried agricultural products to market to lease his truck and driver to a certificated motor carrier for the return trip.

DUE chiefly to the alleged effect of the commission's regulations upon the cost of transporting agricultural products, the decision of the Supreme Court attracted wide attention and resulted in an effort to restrict the commission's power by legislation. HR 3203, which passed the House of Representatives on June 24, 1953, would authorize the commission to make regulations dealing with truck leasing, but at the same time would render this grant of authority virtually meaningless since it provides that nothing in Part II of the act shall be construed as authorizing the commission to regulate the duration of any such lease or the amount of the compensation to be paid the lessor. This bill is now before the Senate Committee on Interstate and Foreign Commerce and is being strongly opposed by the railroads. If the bill should be enacted in its present form it is clear that it would tend to perpetuate the evils and chaotic conditions which have arisen from trip leasing and prevent fair and effective regulation of motor carriers.

The commission already has met the main argument advanced in support of this bill by amending its regulations on July 31st so as to eliminate the 30-day limitation on the leasing of trucks owned by a producer of agricultural commodities or livestock or by certain co-operatives in situations where such truck is used to transport agricultural commodities or livestock to market and the truck is leased to a motor carrier for a return movement to a point in the state from which the products or livestock were transported.

AT the request of four members of the Senate committee and in order to afford the committee more time to consider HR 3203, the Interstate Commerce Commission also postponed to March 1, 1954, the effective date of the regulations regarding the duration of truck leases and the compensation to be paid therefor.

Seventy-five Years of Public Utility Regulation In a Competitive Society

By RALPH M. BESSE*

SEVENTY-FIVE years ago the modern era of public utility regulation was ushered in by the famous Munn *v.* Illinois[1] decision of the U. S. Supreme Court. Before examining what has happened since that decision, a brief review of the political and economic history leading up to it might be of value.

The tradition of individual freedom in the United States was an outgrowth of the political and economic oppression of the European nations. The earliest colonists who settled here were dedicated to freedom of the individual. The demand for political freedom was the major factor in the American Revolution and was strongly and clearly expressed in the founding documents of the new nation—the Declaration of Independence, Constitution, and Bill of Rights.

Support for the desire for economic freedom was found in the new economic philosophy of Adam Smith and other members of the so-called classical school of economics. This philosophy, known by such names as *laissez faire* or competitive free enterprise, emphasized the independence of the individual from the state in the determination of his own economic fortune.

Thus, under these philosophies, the United States became the world model for economic and political individualism. The rights of the individual and the rights of property were relatively unrestrained. The functions of government were limited to certain specified activities necessary to avoid anarchy. The economic system was predicated on the belief that the maximum production of wealth and the greatest social welfare would be achieved when men were free from all forms of control except those of police power.

Under this system, competition became the "guiding hand" which regulated economic activity by turning the "self-interest" of individuals into channels that would result in the production of the maximum goods and services and, therefore, the greatest social welfare.

THE rapid development of industry and the concurrent improvement in the American standard of living were nurtured by the freedom of economic action allowed under the system of free enterprise. Even today, after 175 years, the philosophy of freedom that was the cornerstone of our nation's foundation still holds a predominant place in the ideology of the American system.

The development of regulation of public utilities in such an atmosphere requires explanation.

It is, today, well understood that the controlling characteristic of public utilities which separates them from other industries for regulatory purposes is that they tend to be monopolies. Instead of trying to establish fair competition in such industries, the state has decided that monopoly is in the best public interest. Competition would involve duplication of resources and waste.

But the realization that public utilities differed from other industries in this respect was a long time coming. Although some industries, now known as public utilities, were regulated to a very limited extent prior to the Munn decision, the belief in freedom of enterprise with respect to such industries remained quite strong. People believed that competition between companies would solve the problems of price and service. If one charged too much or gave poor service, another could be chartered to compete with it. Thus, in many parts of the nation, there were two or more public utilities serving the same area.

Eventually, the realization grew that competition in such industries was a

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[1] (1877) 94 US 113.

relatively unstable condition. As time went on, companies began to combine and monopolize the service in their franchise areas. Cutthroat competition between utilities forced them into either bankruptcy or combination. Sharing of one service area made rates to consumers higher than they would have been with one company. Having two or more sets of transit tracks, wires, or gas mains was a public nuisance. It came to be realized that a public utility was inherently a monopoly. Competition between utilities was found to be not in the public interest because the results of such competition were not in the public interest.

In the absence of the automatic regulation of competition, it became necessary to create a substitute. The best substitute for competition between public utilities is public regulation. To better understand this concept, let us take a look at the functions of competition as an automatic regulator of those businesses subject to its force.

The major functions of competition are: (1) promotion of technical progress; (2) promotion of efficiency; (3) regulation of profits; (4) minimizing of prices; (5) promotion of better quality of goods and services; and (6) adjusting supply to demand. Competition is thus a regulator and a spur. It induces progress in spite of the fact that most people are not naturally progressive. It penalizes inefficiency and rewards efficiency. It is sound economics.

In a free enterprise system, the absence of competition without regulation is not thought to be in the public interest. Such a situation can lead to inefficiency, technological stagnation, rigid prices, and excessive profits. Therefore, since public utilities are not subject to competition in the same sense as other industries, they should be regulated. But it is equally clear that such regulation under our economic system is only justified as a substitute for competition.

REGULATION of public utilities should involve a sound application of the economic principles of the American economic system. It should attempt to put regulated industries under the same restraints as the unregulated industries. To go further than that would indicate a lack of faith in the private enterprise system.

We are asking much of regulation when we ask that it follow the guide of competition. As Americans, we have set up a system that indicates we have little faith in economic planning by the government. Yet, we are asking our regulators to exercise the judgment of thousands of consumers in the evaluation of our efficiency, service, and technical progress so that a fair profit can be determined. Fair regulation is now, and always will be, a difficult process. But it is not impossible.

It is necessary for us to remember that we still operate under a relatively free economic system in which competition is the major regulating, directing, and organizing force. When we remove certain industries from control by that force, we must substitute other controls to take its place. These controls have no justification under our economic system unless they perform the functions of competition. Let me repeat that: These controls have no justification under our economic system unless they perform the functions of competition. When they go beyond this, they destroy private enterprise in the utility field.

THE question which now comes to mind is this—has regulation been applied in accordance with the economic principles of a competitive system? The rest of my talk will be devoted to an attempt to answer this question.

The history of modern public utility regulation consists of three major phases—legislative, judicial, and administrative. The legislative phase began with the Munn *v.* Illinois decision in 1877. The Granger movement of the 1870's had helped bring about the establishment of some strong state commissions with control over the rates of railroads and some other businesses. The farmers had found that their economic bargaining power was very limited in dealing with the grain elevator proprietors. When the state of

Illinois passed a law regulating these elevators and prescribing maximum rates, their right to pass such a law was challenged. The U. S. Supreme Court, in upholding the right of Illinois to pass such a law under its police powers, thus established the constitutionality of such laws. It was also ruled that rate control was a legislative function and that recourse against abuse of that function must be political and not judicial.

It became apparent over the next few years that the legislatures were not properly organized to carry on rate regulation. The Supreme Court soon changed its position concerning legislative abuse of the states' new-found power and warned commissions that rates should not be "confiscatory."

In a decision in Chicago, M. & St. P. R. Co. *v.* Minnesota[2] in 1890, the Supreme Court reversed itself completely, saying that the reasonableness of a rate was subject to judicial review. This was the beginning of the long judicial phase which was strongly concerned with the economic aspects of regulation.

THE Smyth *v.* Ames[3] decision of the Supreme Court in 1898 was a real step in the direction of sound economics in public utility regulation. The decision listed the many factors of valuation that a commission must consider in order for the results to yield a fair return on the fair value of utility property. Smyth *v.* Ames indicated that regulation would not be an easy job. It indicated the necessity for trained people on the staffs of the utility commissions.

Many students of public utility regulation have claimed that the Smyth *v.* Ames decision hamstrung commissions with complicated matters of law, accountancy, engineering, and economics. In reality, the decision merely recognized that regulation was complicated and not subject to a simple formula method that could be applied with equity in all cases or at all phases of the economic cycle.

Reproduction cost became the synonym for fair value. At the time, the commissions were quite willing to accept reproduction cost with price levels below what original cost valuation would have brought. Later, the public regulators came to regret their acceptance of this doctrine—not because it would result in inequitable prices for utility services, but because it would mean higher rates comparable to the price increases throughout the rest of the economy.

REPRODUCTION cost, no matter which phase the business cycle may be in, recognizes the parallel economic factors under which unregulated industry must operate. In competitive enterprise, current incremental costs determine prices—thus reproduction cost puts utility owners on the same earnings basis as competitive enterprise. Reproduction cost takes into account the changes in the purchasing value of the dollar. Thus, it recognizes both inflation and deflation as they are recognized under competitive pricing. It is even politically good in that it tends toward lower rates in depression times when the pressure for price cuts is greatest, and higher rates in boom times when people can better afford them. But, the really strong argument for reproduction cost is that it sticks strictly to the original purpose of, and justification for, regulation by limiting regulation to those factors whose benefits might otherwise be lost by eliminating competition. Thus, the rate increases which might occur because there is no competition are controlled, but the cost variations which result from outside economic influences are permitted.

Some of the objections to strict observance of reproduction cost have some validity. They do not, however, destroy the concept—they merely modify it. The argument that reproduction cost is too difficult to determine has no validity whatsoever, as is illustrated by its successful application in Ohio. There, it works well for the consumer as well as the utility and has resulted in low rates and healthy profits. That the consumer does not object too vigorously to Ohio

[2] (1890) 134 US 418.
[3] (1898) 169 US 466.

rates under reproduction cost new may be seen in the fact that bills for its repeal, introduced in the Ohio legislature in each of the past few years, have had little support. The public utilities commission of Ohio has had the capacity and ingenuity to apply this method of valuation so that the results are equitable to all concerned.

Following the Smyth *v.* Ames decision, up to the 1930's, there were a number of cases in which the Supreme Court ruled that commissions must give weight to reproduction cost in determining fair value.[4]

In the 1920's, rising prices resulted in some modification of reproduction cost. Attempts were made to determine a relatively "normal" plateau of prices based on future predictions of price trends.[5] Another modification was the so-called "split inventory" method.[6] This based value on normal prewar reproduction cost for prewar investment and actual prices for investment made during and after the war. These modifications of reproduction cost were attempts to make valuation reflect the long-run economic trends of the times in line with the experiences of competitive business.

Where Smyth *v.* Ames forced the state commissions to consider the economic factors in rate base valuation, the Bluefield Case[7] accomplished the same purpose in rate of return. The Supreme Court, in this decision, found that determination of the annual rate that would constitute just compensation depended on many circumstances and required the exercise of a "fair and enlightened judgment." Though warning against speculative profits, the court found that a utility was entitled to a rate "equal to that generally being made at the same time and in the same general part of the country on investments and in other business undertakings which are attended by corresponding risks and uncertainties." Thus, judicial recognition was given to the fact that utilities must compete for capital in the same markets as unregulated industry. The return, continued the court, should be sufficient to assure confidence in the financial soundness of the utility and adequate to support its credit and enable it to raise necessary capital. It was pointed out that the reasonableness of a particular rate of return would change as changes occurred in the opportunities for investment, the money market, and business conditions in general.

The judicial phase put the regulatory commissions on the spot. The rule of Smyth *v.* Ames required that full consideration be given to the many economic factors pertinent to valuation. It limited regulation to those factors arising as a result of elimination of competition, since valuation of property would be changed only as a result of changing economic conditions. The Bluefield Case said that the fair rate of return for a utility should be gauged by that received in competitive industry of similar risk. Regulators were faced with the choice of either searching out the facts and reaching a decision in line with those facts, or having their decision overruled by the courts.

The Los Angeles Gas & Electric Corporation Case (1933)[8] signaled the end of the judicial phase of regulation. In this case the Supreme Court held that where a utility could not prove confiscation of its property, the procedure and method of determining reasonable rates would be in the commission's jurisdiction. Thus

[4] Knoxville *v.* Knoxville Water Co. (1909) 212 US 1; Willcox *v.* Consolidated Gas Co. (1909) 212 US 19; Minnesota Rate Cases (1913) 230 US 352; Galveston Electric Co. *v.* Galveston, 258 US 388, PUR1922D 159; Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 US 276, PUR1923C 193; Bluefield Water Works & Improv. Co. *v.* West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11; McCardle *v.* Indianapolis Water Co. (1926) 272 US 400, PUR1927A 15.

[5] Galveston Electric Co. *v.* Galveston, 258 US 388, PUR1922D 159.

[6] Georgia R. & Power Co. *v.* Georgia R. Commission, 262 US 625, PUR1923D 1.

[7] Bluefield Water Works & Improv. Co. *v.* West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11.

[8] Los Angeles Gas & E. Corp. *v.* California R. Commission, 289 US 287, PUR1933C 229.

began the doctrine of end result and the administrative phase of regulation. Commissions were freed from what the academic fraternity called "the shackles of the rule of Smyth *v.* Ames." Only in cases of obvious injustice would the courts interfere with rulings of the regulatory bodies. The method of determining "end result" was not important—even if sound business and economic precepts were ignored—as long as the utility was unable to prove to the court's satisfaction that its property was being confiscated.

THE depression of the 1930's brought many changes in the social and business structure of the economy. The economic theorists, in their search for the cause of the debacle of 1929 and its aftermath, concluded that the Federal government should have a leading rôle in regulating the operation of the business system. Their conclusions and their theories were applied by the administration in power, and, as a result, regulation of industry in general was increased in scope. This philosophy was reflected in the decisions of regulatory bodies as well as in the rulings of the courts. During this period, the Federal regulatory commissions were organized or strengthened, and some utilities found themselves faced with the growing giant of direct Federal competition.

In this changed economic atmosphere, with the courts abdicating their review authority to the commissions, what happened to regulation? Did the new-found freedom of action granted to the commissions result in equitable regulation? Did the regulatory treatment of utilities follow the original concept of substitution of control for competition? Let us examine this most recent phase to see what has happened.

The Supreme Court decision in the Natural Gas Pipeline Case[9] in 1942 was an intimation of the change in thinking relative to valuation of utility property for rate-making purposes. The rule of Smyth *v.* Ames was not denied, but the court said that the commissions were not bound to any one formula. It remained for the decision in the Hope Natural Gas Case[10] to deal the final blow to what had been accepted practice in valuation since 1898.

THE arguments that the Hope Case did not "lay the ghost" to reproduction cost are specious. While it is true that the court did not approve any particular method of rate base determination, the result was an almost wholesale rush toward original cost by the regulatory bodies. Valuation by this method ignores completely what occurs in the competitive segment of industry where fixed plant tends to rise and fall in value with earnings and the price level. Original or historical cost does not limit regulation to those factors which arise as a result of the elimination of competition—it does not require consideration of any of the economic factors of the present, nor does it allow a forecast of what may logically happen in the near future.

Those who claim that strict observance of original cost will result in equity to the investor and consumer in all phases of the business cycle are ignoring reality. The consumer, under original cost, will always get lower rates than are warranted by the economic facts as long as price trends continue upward. The investor in utility equities will, under the same circumstances, always receive less than competitive conditions would justify as his economic reward for risk-taking. If price trends move downward, the exact opposite situation would theoretically occur—consumers would pay higher rates than economically justified while investors would receive an excessive return.

Would historical cost be applied as vigorously on the downside of the cycle as it has been applied on the upside? If the nation were to enter a long-term period of declining prices, would the regu-

[9] Federal Power Commission *v.* Natural Gas Pipeline Co. of America (1942) 315 US 575, 42 PUR NS 129.

[10] Federal Power Commission *v.* Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR NS 193.

latory bodies ignore the almost certain public demand for rate decreases by allowing utilities a valuation based on original cost of plant built during the postwar, high-cost construction period? The answer to these questions is obvious: It is "No."

THE favorite argument used by advocates of the historical cost formula is that this method of valuation makes the job of regulation more convenient and less difficult for the regulatory bodies. They are absolutely correct. Nothing could be simpler than to examine the accounting records of a company, find the book entries for the plant account, make the necessary other accounting and formula adjustments (which I will mention later), and say, "This is it, boys." It may make the task of regulation easier but only by happenstance does it ever result in equitable treatment of the regulated companies. When regulation is made so easy, it is not necessary to worry about whether qualified people are hired as regulators. No expert opinion is needed, or even wanted, if regulation is to become the mere application of a fixed formula to hold good even though changed conditions may make the results of such application seem ridiculous.

There are those who admit that the historical cost method of rate base valuation may not be flexible enough to fit into changing economic conditions. However, they say, it is not necessary to have a value rate base to overcome this inflexibility.

They conclude that historical cost can result in equitable regulation if it is used with an adjusted rate of return which rises and falls as economic conditions warrant. It is true that, in theory, varying the rate of return would improve regulation in original cost jurisdictions. But, if so, why haven't such variations taken place in some rate decisions during one of the worst inflations in our history? The trend of decisions on rate of return has indicated a lower rate rather than the higher rate that would be logically expected in time of inflation.

IN order to accept original cost as being equitable as well as easy to administer, it is necessary also to accept the economic assumptions of the 1930's. These assumptions presumed that the economy was stagnant, that interest rates would stay on a downward trend, and that the opportunities for investment would decline. The implication was that, in the long run, money would tend to retain its value. These so-called Keynesian theories also placed major emphasis on the demand side of the supply-demand equation. It has been proved in recent years, that these assumptions are incorrect. The postwar expansion of all industry does not support the stagnation thesis. Interest rates have trended upward since late 1947. Investment opportunities have certainly not decreased. Money has not been a stable measure of value.

The utility equity investor has had to bear the burden of the unsound economic assumptions involved in original cost theories.

The utility companies have to share the blame for the adoption of this original cost theory of valuation. They did not vigorously fight its application in the beginning because price levels were relatively stable at that time. They were not farsighted enough to see how the use of this method might endanger the very foundations of private ownership in the utility industry. They are quite aware of the danger now.

THE fact that original cost may not fill the bill in an inflated economy has received recognition in some recent telephone rate cases. For example, in 1952 the circuit court set aside a decision of the Indiana commission in the Indiana Bell Telephone Company[11] Case because no recognition was given to reproduction cost. This year, the Illinois Supreme Court, for the same reason, set aside a commission decision in the Illinois Bell Case.[12] In the New England

[11] Indiana Bell Teleph. Co. *v.* Public Service Commission (1952) 93 PUR NS 480.

[12] Illinois Bell Teleph. Co. *v.* Commerce Commission (1953) 98 PUR NS 379.

Telephone & Telegraph Company Case,[13] the Maine Supreme Court, in 1953, set aside a commission decision which refused to let the company offer proof of current values and rising costs in evidence of the rate base and the need for higher rates.

In other recent cases, the Maryland Supreme Court[14] reaffirmed that current cost of reproduction must be considered, and a Federal court in Texas issued an injunction against local regulation which has failed to consider reproduction cost.

This change in thinking has been a long time coming, but it is very encouraging to see the courts again take judicial note of the economic factors in rate base valuation.

How have the regulatory bodies handled the problem of rate of return under the freedom of action of the administrative phase? In the Bluefield Case, the Supreme Court had noted that utilities must compete with other industry in obtaining their investment funds and that the rate of return, to be fair, must necessarily reflect that competition. The Hope Case decision did not invalidate the findings in the Bluefield Case, but it did leave the door open to commission discretion. And, as has been the case with rate base valuation, commission discretion has not always been in line with sound economics. Very few commissions, in setting a rate of return, have shown interest in an examination of alternative investment opportunities outside of the utility field in order to allow utility equity investors a rate comparable with that of similar risk, nonregulated industries.

The trend in regulation of rate of return since the Hope Case has been, in many jurisdictions, either to maintain some fixed percentage, or to reduce the percentage allowed. Maintaining a fixed percentage rate and applying this rate against a historical cost rate base shows an utter disregard of economic trends. Reducing the percentage, when the rates earned by investors in unregulated industry have reached new highs, means that the utility equity investor has been left out in the cold. Not only does he not participate in the earnings of a boom economy, but he finds that the real value of his investment has been diluted.

In competitive industry the rate of return received reflects the factors of pure interest, risk, financing costs, and reward for efficient management, plus an amount to be retained in the business. Therefore, if regulation is to be a substitute for competition, the regulatory bodies are obliged to allow public utilities a rate of return which reflects these factors.

The most recent trend has been to accept historical cost of money as the sole yardstick of reasonableness in rate of return determinations. Such a procedure was followed by the Federal Power Commission in the Northern Natural Gas,[15] Colorado Interstate Gas,[16] and Mississippi River Fuel[17] cases. Cost of capital has never before been even a narrowly accepted sole measure of the rate of return.

The fallacies of such a procedure are quite obvious. Limiting the rate of return on borrowed money to the interest cost eliminates completely the leverage factor. This limits the appreciation possibilities of the common stock. Using this formula puts a ceiling on potentialities of per share earnings since a rise in the common stock market price would lower the earnings-price ratio and might force a rate decrease. Thus, you might say, the vagaries of the stock market would control rates. Using past cost to set future rates, especially in an infla-

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[13] New England Teleph. & Teleg. Co. *v.* Public Utilities Commission (1953) 98 PUR NS 326.

[14] Chesapeake & P. Teleph. Co. *v.* Public Service Commission (1952) 97 PUR NS 50.

[15] *Re* Northern Nat. Gas Co. (1952) 95 PUR NS 289.

[16] *Re* Colorado Interstate Gas Co. (1952) 95 PUR NS 97.

[17] *Re* Mississippi River Fuel Corp. (1952) 95 PUR NS 435.

tionary period, is illogical. How would the continued application of this doctrine affect the gas companies' expansion plans? The market weakness in natural gas equities after the Federal Power Commission rulings provides the answer. The cost of capital formula allows no reward for efficiency and, in fact, would result in a higher rate for less efficient companies because of their higher cost of capital.

The fallacies of this recent development have been discussed at length in a series of articles in the PUBLIC UTILITIES FORTNIGHTLY, and have been reprinted in pamphlet form under the title, "Should Cost of Capital Limit a Utility's Return?"

Inequitable regulation has a tendency to spread. In six out of ten state commission rate decisions on Bell system subsidiaries in early 1952, the rate of return was fixed more or less on the basis of cost of capital. In one case, however, the Illinois Supreme Court[18] upset a commission decision partially because of the commission's use of cost of capital. Just last month, the Eighth U. S. Circuit Court of Appeals upset the Federal Power Commission order in the Northern Natural Gas Case and called it "unjust and unreasonable." The Federal Power Commission has, apparently, already abandoned its position on cost of capital and returned to the cost of service concept with its decision in the Texas Eastern Transmission interim rate settlement late last year. Perhaps the adverse publicity, stock market reaction, and determination of the natural gas companies to fight it out in the courts, has had some effect.

TURNING to depreciation, the regulatory treatment of the depreciation reserve in relation to the rate base has run the gamut from no deduction through deduction of an engineering determination, deduction of an accounting reserve, and deduction of a computed amount. In the administrative phase of regulation, again, the regulatory bodies have looked for the easy way out in their treatment of the reserve. Deducting the reserve from the historical cost rate base, which the Hope Case seems to allow, has simplified the regulatory computation of a rate base but is not in line with sound economics, equitable regulation, or value concepts in competitive, unregulated industry. Such deduction is based on the questionable theory that the customer has a full equity in the depreciation reserve. Whatever equity the customer may have certainly arises only if: (1) the utility is able to make full use of these funds by reinvesting them in the business; (2) the utility is already earning a fair rate of return; (3) the reserve is adequate to replace the property; and (4) there is some allowance made to compensate management for the responsibility of managing these funds. Few commissions take the trouble to make a full investigation of the equity of the reserve deduction when finding value for rate-making purposes. Yet competitive conditions would automatically adjust for these counterequities of the common stock investor.

THE trend in depreciation accrual allowance has also been in the direction of simplicity. Straight-line depreciation of original cost has become the accepted formula for depreciation accounting. Depreciation allowance by this formula recovers only dollars and does not allow for real costs. The American dollar has certainly not been sanforized. Its shrinking value in recent years has placed a tight collar around the neck of the utility equity investor who finds that inadequate provision for replacement results in misstated earnings and exhaustion of his capital investment. Use of this formula represents one more case of utility regulation going beyond what is necessary to approximate conditions in unregulated industry. Competitive industry is able to recover value rather than original cost through the plow-back of earnings or by making special provision for higher depreciation. The steel

[18] Illinois Bell Teleph. Co. *v.* Commerce Commission (1953) 98 PUR NS 379.

industry, in particular, has recognized the inflation danger by provision of special reserves for higher replacement costs.

REGULATION has gone quite deeply into the area of management through the substitution of mathematical formulae for what used to be the judgment of the utility management. The growing use of the so-called one-eighth formula for determining working capital to be allowed in the rate base is a case in point. When such a formula is applied in all cases and at all times it must result in inequitable regulation. What is adequate working capital for one company may be completely inadequate for another. Working capital that is adequate now may not be adequate in the future. Placing a ceiling on the allowance limits the flexibility of decision which good management needs in order to take advantage of current conditions. It is the current economic and business factors which should determine a company's need for working capital—not a formula set by an administrative body which has neither the time nor the knowledge to judge such needs. Unregulated industry has no such problem.

A recent and very dangerous outgrowth of this working capital formula has been the theory that alternative funds, such as Federal income taxes collected in advance of payment, should be used for cash working capital purposes. For example, the Federal Power Commission held, in the recent Alabama-Tennessee Natural Gas decision,[19] that the company's working capital must be reduced by the cash collected in advance for payment of Federal income taxes. The Mills plan, requiring a speed-up in payment of taxes, makes such deduction even more dangerous since companies are coming closer to a pay-as-you-go basis and a sharp down turn in revenue could put a company in a serious cash position.

THE full use of tax funds for cash working capital is speculation, pure and simple. Regulation is supposed to ensure the financial integrity of utilities by requiring conservative financial practice.

Only the most speculative unregulated companies make full use of tax funds for cash working capital, and they sometimes get into financial difficulties because of this. If the regulators are going to force utilities into such unsound and speculative financial practices, it will be necessary for them to recognize the increased risk to investors inherent in such practices. And, as risk increases, it follows that the investor's reward for risk-taking must be increased if capital is to be attracted to the industry without penalty to the existing owners.

Some state commissions have apparently followed the lead of the Federal Power Commission in scaling down allowances for cash working capital by deducting tax reserves. In recent cases involving United Fuel Gas,[20] Chesapeake & Potomac Telephone,[21] and Pennsylvania Telephone,[22] the cash working capital was adjusted, or even eliminated, because of the amount of cash available through collection of Federal income taxes in advance of payment.

ANOTHER recent complication is that the regulatory lag in granting of rate relief imposes more new taxes on the utility equity investor when the company is earning less than a fair rate of return. Again, some commissions have not been disposed to grant rate relief when increased earnings would put the utility in the excess profits tax bracket. It is contended that the burden of a rate increase on the consumers would primarily benefit the tax collector. This would mean a great burden on the stockholder. Unregulated industry can, to a large extent, pass on tax increases to the consumer. It may be argued that the same should hold true for the regulated companies, if

[19] *Re* Alabama-Tennessee Nat. Gas Co. (1952) 94 PUR NS 426.

[20] *Re* United Fuel Gas Co. (1952) 95 PUR NS 65.

[21] *Re* Chesapeake & P. Teleph. Co. (1952) 93 PUR NS 215.

[22] Pittsburgh *v.* Public Utility Commission (1951) 169 Pa Super Ct 400, 82 A2d 515.

such regulation is to be a true substitute for competition.

During World War II, the heavy tax load which the utilities were forced to bear cut so deeply into the earnings of stockholders that Congress subsequently, in 1950, amended the new excess profits tax so as to give partial exemption to regulated utilities.

When the war began in Korea, Congress set up a program of rapid amortization of emergency defense facilities in order to induce industry to take the risks inherent in investing in plant and equipment purely for defense purposes. Under the program, industry is able to write off certified plant in five years for tax purposes, and, therefore, receive a higher-than-normal income for those years. Unless, however, tax rates decline after the 5-year period, the only benefit received by a utility company is the use of interest-free funds for construction purposes during that period. Since taxes would be higher after the period of accelerated amortization, utility companies have asked for, and many state commissions have granted, permission to normalize income by the amount of the tax saving, in order to provide a reserve to pay the future higher taxes resulting from the acceptance of fast amortization certificates. Many utilities have felt that, if the tax savings during the 5-year period were allowed to increase gross income, they would be forced into giving rate decreases.

It is certainly illogical to use an act of Congress which was intended to induce investment in facilities for national defense to force rate decreases. The ratepayer was induced to do nothing. And, it is completely illogical to let the reduction in taxes be reflected in net income, thereby misleading investors into paying higher prices for stock than they would if they realized the future tax liability involved. Yet, some regulators are advocating that these tax savings be reflected in income and that rates be reduced by amount saved. Such regulation goes far beyond substitution for competition.

Another regulatory liability which has developed in the administrative phase is that of overlapping jurisdiction between Federal and state regulatory bodies. I covered this subject in my discussion before this group in September, 1950, so I will mention it only briefly now. Federal regulation was authorized by Congress under the commerce clause of the Constitution to fill in the gap in regulation caused by utilities operating across state lines. Since the early 1930's, the growth of Federal regulation in relation to state regulation has been increasing rapidly. Much of the growth has been in the direction of encroachment on the accounting, rate making, and other functions of the state commissions. Many cases could be cited as examples of Federal encroachment, but I will refer you to just four—East Ohio Gas Company,[23] Jersey Central Power & Light Company,[24] Arizona Edison Company and Central Arizona Light & Power Company,[25] and Mount Morris Gas Company.[26] This frequent conflict in jurisdiction between state commissions and the Federal bodies places the utility managements in a difficult position. When regulation concerns itself with controversy over jurisdiction, the results often make for poor regulation. Regulation of this type is not concerned with finding the substitute for competition—it is just regulation for the sake of regulation.

This talk would not be complete unless I brought out the fact that, though public utilities are monopolies in a legal sense, they are not free from competition in the business sense. Virtually all utilities have increasing direct competition with other products, to say nothing of the indirect competition for the con-

[23] Federal Power Commission *v.* East Ohio Gas Co. (1950) 388 US 464, 70 SCt 266, 82 PUR NS 1.

[24] Jersey Central Power & Light Co. *v.* Federal Power Commission (1943) 319 US 61, 63 SCt 953, 48 PUR NS 129.

[25] *Re* Arizona Edison Co., *Re* Central Arizona Light & P. Co. (1950) 84 PUR NS 3.

[26] *Re* Mt. Morris Gas Co. (1942) 3 FPC 818.

sumers' dollar. An electric utility may have competition from the gas industry in its area, and vice versa. A gas utility may have competition from locally mined coal. In particular, many electric utilities face direct competition from privately owned industrial generating plants and other localities in the industrial development field. As such competition increases, the regulation of the market place increases. This is the soundest form of all regulation and it should be permitted to perform its economic function. However, as the regulation of utilities in the market place increases, the purpose in being of the regulatory agencies decreases. This concept requires acknowledgment in commission decisions if regulation is to act as a competitive substitute.

Besides, competition from other business enterprise, regulated industry—particularly in the field of electric power—is faced with increased competition from government and government-subsidized enterprise. The major growth and development of this form of competition took place during the administrative era of regulation. The economic and political philosophy of the 1930's was the perfect breeding ground for the major growth of public power. The utility industry, because of the financial manipulations in holding company securities and the attendant financial failures, was not in the good graces of the public.

IN such an atmosphere, the founding of the Tennessee Valley Authority took place. The "yardstick" idea was popular and received considerable publicity. It was felt that, by using the Tennessee Valley Authority as a measure of electric rates, the rates of the private electric utilities could be kept low. Such a theory, though completely out of line with the monopoly basis for regulation, was widely accepted at the time. Regulation by the use of public power projects as yardsticks is unfair regulation although it may be good politics. It is not a good substitute for competition. No public power project can ever be a real measuring device as long as it is tax-exempt, or can obtain construction money at government bond money rates, or can allocate part of its electric costs to flood control or navigation.

The "yardstick" idea, though it still crops out now and then, has largely been abandoned by even the strongest advocates of Federal power ownership. The major danger of Federal power now comes from its direct competition with private utilities. When there is direct competition between government and private industry, the government will always win because of the special privileges granted to public enterprise. It is almost impossible for investor-owned industry to meet a price which does not include taxes or equity capital costs. To illustrate this, more than 100 electric companies have gone under since 1933 because of government competition. This is not regulation substituting for competition—this is cutthroat competition substituting for regulation.

THE application of the preference clause of the Federal Power Act also has its effect. Since this clause provides for the marketing of power from Federal power projects by first offering it to municipalities, rural electric co-operatives, and other public bodies, the bureau in charge has a perfect excuse for building transmission lines which duplicate those already set up by private companies. That is, they have the excuse if they can't (or won't) get a wheeling contract signed by the private companies. In many cases, it has been illustrated that they don't even want wheeling contracts. After the transmission lines are built, a citizens' group in a near-by city served by a private utility starts agitating to get some of the Federal "low-cost" power. The next step is the setting up of a municipally owned plant which buys out the private company. Thus, another investor-owned utility goes down under the growing Federal power threat.

The rural electric co-operative is another device which has been used to further the public power idea. The original purpose of the Rural Electrification Ad-

ministration was to help supply electricity to persons not receiving central station service. This purpose has not been adhered to in recent years with the co-operatives actually going after private utility customers. These subsidized co-ops are no longer content merely to own their own transmission lines, but are starting to build their own power plants.

There is another important area in which Federal power activities interfere with private enterprise in the electric utility business—the area of expansion of hydroelectric facilities. The Interior Department has claimed that the Federal government has sole developmental rights to power sites on navigable rivers. This claim has resulted in the holding up of expansion plans of electric utility companies. In the case of Roanoke Rapids and Hell's Canyon, Interior saw fit to intervene in the granting of licenses to utility companies by the Federal Power Commission and, in the Roanoke Rapids Case, the problem was carried all the way to the U. S. Supreme Court. In his legal brief, Mr. Chapman, then Secretary of the Interior, asserted that his interest in the case was "that of a competitor of Vepco in the sale of power . . ." The Supreme Court, in its decision in the Roanoke Rapids Case,[27] however, upheld the right of the private companies to develop such sites. In the Hell's Canyon Case, the new Secretary of Interior has withdrawn the objections of the Federal government to private development of hydro power on the Snake river.

The proposed Niagara river redevelopment is another case in point. Five investor-owned companies have banded together to construct hydro facilities at Niagara Falls. The opponents of private development have exerted much pressure in Congress to get the project for the Federal government. Though plans for private construction provide for the same results as construction by the Federal government with the added advantages of increased tax revenues, the issue remains deadlocked. Federal power advocates cannot even claim the issues of navigation or flood control to help them justify Federal development of this project.

Direct Federal competition and the interference with investor-owned utilities' expansion plans increase the risk which the utility equity investor must face. Direct competition between municipally owned companies and investor-owned companies in some localities has the same result. Commissions should allow for these factors where appropriate by adjusting rates to reflect the increased risk.

If government pursued a strictly logical attitude, it would remember that monopoly has come to be regarded as the normal thing in the public utility field in order to produce the lowest cost of operation and the best service to the consumer, and, therefore, it would not contemplate entering into competition. If we believe in government ownership of the utility industry, that is eventually what we can expect to have if direct competition from the government continues to grow.

If, however, we still believe that investor ownership of public utilities under effective regulation fits best with the concept of a free enterprise economy, we should ask the government to get out of the power business.

In summary, what has happened in the last seventy-five years of public utility regulation? The legislative phase established the authority of state regulatory commissions. The judicial phase was concerned with the economic results of regulation so that application of the decisions of regulatory bodies would result in an approximation of what happened in competitive industry. The administrative phase has been largely concerned with making regulation the universal application of accounting formulae, thus giving more consideration to expediency than to equity.

[27]United States ex rel. Chapman *v.* Federal Power Commission (1953) 345 US 153, 73 S Ct 609, 97 PUR NS 129.

Since the mid-1930's, regulation has encroached more and more into the area of utility management. The pressure of Federal power activities, both from "yardstick" propaganda and direct competition, has taken its toll among the investor-owned utilities. The increased taxation and inflated economic system have created pressures which many regulatory commissions have been unwilling to face. Whereas, unregulated industry has been able to recoup increased costs by raising prices, the utility commissions have often found such price increases politically inexpedient.

The result of the U. S. Supreme Court decision in the Hope Case has been a major departure from sound economics in the decision making of regulatory commissions. There has been a growing tendency to treat all utilities as marginal firms where no reward is allowed for differentials in management efficiency. In unregulated industry, profits are a measure of differential performance. If a "fair profit" in the utility industry is to mean some standard rate of return on capital, the incentive to progress and efficiency will be removed. The removal of such an incentive negates the American concept of profits which holds that society will be best served if those companies that are highly efficient are permitted to enjoy substantial profits whereas those that are only passable in this respect might be expected to gain only a moderate profit. Competition sees that such incentives are offered to unregulated industry. The regulatory commissions should see that the same incentives are given to the utility industry.

The courts have abdicated their review powers, except in instances of obvious inequities, on the presumption that the administrative bodies are able to make decisions in line with economic realities. This presumption does not hold as long as the formula concept of regulation gains unquestioned, and often unjustified, acceptance by the commissions.

The utility equity investor has had to bear the brunt of the inequitable regulation of recent years. Comparative figures for the unregulated industrials and the regulated utilities indicate the burden placed on the common stockholders of utilities. These figures show that the purchasing power of common stock earnings for industrial companies, on the average, had *increased* 28 per cent in 1952 over what they had been in 1940. In the same period for utilities, on the average, purchasing power of their common stock earnings had *decreased* 24 per cent. This is regulation which goes much farther that substituting for free competition.

Now that we have seen what has happened in the first seventy-five years of public utility regulation, what can be done to improve regulation in the next seventy-five years?

First, we need to re-examine the purpose of regulation. As Americans, we have accepted the belief that a competitive economic system is better than any other. We have accepted the concept that the utility industry is naturally monopolistic. We have accepted the principle that a monopoly should be regulated because the normal competitive spur is absent. It logically follows then that the absence of competition, in the normal sense, is the only justification for regulation of public utilities. Regulation should be directed toward the accomplishment of the major functions of competition which include: (1) promotion of technical progress; (2) promotion of efficiency; (3) regulation of profits; (4) minimizing of prices; (5) promoting a better quality of goods and services; and (6) adjusting supply to demand. When regulation does not accomplish these goals, it is poor regulation. When regulation goes beyond these goals and sits in the chair of utility management, it is in conflict with the economic principles on which the nation is founded. It is then a step toward the planned society of Fascism or Socialism. I don't believe that Americans want such a society.

Second, we need to return to sound economics in regulation in order that the

purpose of regulation can be accomplished.

We must have trained people on the staffs of the regulatory agencies: people who will be able to make decisions which reflect the economic conditions of the times; people who will search out the facts in each case and make findings in line with those facts; people who will reject the formula method of regulation as being too inflexible; people who will recognize that while equitable regulation is an extremely difficult task it is not impossible; and finally people who will see that the utility investor is not forgotten in the regulatory process.

THIRD, we should ask the Federal government to stop competing with the investor-owned utilities. The inherent monopoly characteristics of the utility business make this competition extremely wasteful. Continued growth of Federal competition can only lead to full public ownership in the long run, for private enterprise cannot long exist in the face of the special privileges granted to government enterprise. Though there are those who hope that the Federal government will eventually own and operate the utility industry, I firmly believe that the majority of Americans would find such ownership distasteful.

Four, the encroachment of the Federal agencies on the regulatory functions of the state commissions should be stopped. Federal regulation has its proper sphere in the regulation of interstate commerce. That is the sphere in which it should remain.

If we are to have regulation function as a substitute for competition, state commissions are the proper agencies to carry out that purpose. They know the problems of the companies they regulate. They also know their responsibilities to the consumers.

TODAY, we again have a changed political atmosphere in this country. The new Federal administration has indicated that private enterprise in the utility industry will no longer be a "whipping boy" for political purposes. This administration has stated often, and unequivocally, that it believes in private enterprise wherever private enterprise can and wants to do a job. As an example of this new thinking in the higher ranks of the Federal government, let me read to you a quotation from a speech by Sinclair Weeks, Secretary of Commerce, made before The American Iron & Steel Institute on May 28, 1953:

> When regulation departs from its traditional rôle and encroaches on the field properly allocated to management, it may well slow down the progress and development of the industries being regulated.
>
> This has happened and, as a result, the public has not received the best service at the cheapest price, which otherwise it could have received years ago.
>
> No group has been more unwisely and unfairly treated than the service industries. Yet the railroads, the power and light, the gas industries, and those furnishing communications employ millions of workers, dependent for livelihood on the success of these industries, which are vital to all other industry and to the general consuming public. . . .
>
> In regulating utilities and in managing other things, it is cheaper for the public in the long run to have those that serve it well-fed and strong, rather than half-starved and weak. There are ways of getting good service out of the strong. No one can get it out of the weak. . . .
>
> If the regulated industries are to render their full services to the nation, it is my judgment that the regulatory bodies must allow earnings adequate to attract and support the equity capital they can use effectively for economics, improvement, and growth. . . .

THE atmosphere in which regulation must operate has thus been cleared. Therein lies a challenge which we, as lawyers in the field of utility regulation,

must meet. Let us help guide regulation into the proper channels where the sound application of the economic principles of the American system will result in equity for the investor and consumer. Let us educate the utility companies and the state commissions as to the purpose of regulation in a competitive society. In this manner, we will be able to help make the history of the next seventy-five years of public utility regulation one of progress and fairness to all concerned.

EDITOR'S NOTE: *Part II of the foregoing Appendix will be published in the next issue of* PUBLIC UTILITIES FORTNIGHTLY, *which will be out October 22nd. Part II will contain addresses at the Boston meeting of the Section of Public Utility Law of the American Bar Association given by the following speakers: John B. Prizer, general counsel, Pennsylvania Railroad Company, Philadelphia, Pennsylvania; Francis X. Welch, managing editor, Public Utilities Fortnightly, Washington, D. C.; Stuart F. Kosters, assistant appraisal manager, Stone & Webster Engineering Corporation, Boston, Massachusetts; D. F. Houlihan, partner, Price Waterhouse & Company, New York, New York; and Albert H. Gordon, partner, Kidder, Peabody & Company, New York, New York.*

Titles and Index

Preprints in This Issue of Cases to Appear in

PUBLIC UTILITIES REPORTS

TITLES

INDEX

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PUBLIC UTILITIES REPORTS

WYOMING PUBLIC SERVICE COMMISSION

Re Northern Utilities Company

Docket No. 9146 Sub 1
July 17, 1953

APPLICATION *by natural gas company for increase in rates; increase authorized.*

Apportionment, § 6 — Natural gas company — Appliance business.

1. The expenses of a natural gas company which is also engaged in the appliance business are properly allocated in a rate proceeding when direct merchandising costs are excluded from operating expenses and joint expenses are assigned to the utility business or the appliance department in proportion to the amount of time expended by employees rendering services to both departments, p. 3.

Rates, § 143 — Reasonableness — Cost of service.

2. An increase in rates was allowed a natural gas company where the present rates had resulted in a net loss for the preceding year because of the increased cost of gas, materials, wages, and taxes, p. 4.

Rates, § 1 — Legal requirements — Formula.

3. The Commission, in determining the rate structure of a utility, is under no legal obligation to employ or follow any specific formula, p. 4.

Valuation, § 36 — Net investment cost rate base.

4. Net investment cost should be used as a rate base standard in determining what are just and reasonable rates for a natural gas company, since this base is fair to both customers and investors, is practical and easily understood, is used by other regulatory bodies not otherwise bound by statute, and is acceptable to the courts, p. 4.

Depreciation, § 66 — Natural gas company — Percentage allowed.

5. An annual allowance of 3 per cent on a straight-line basis to cover depreciable property of a natural gas company was deemed fair and reasonable, p. 6.

Valuation, § 313 — Cash working capital — Natural gas company.

6. A cash working capital allowance sufficient to cover a 45-day period was included in the rate base of a natural gas company, in an amount equal to one-eighth of the annual operating expenses excluding taxes, interest, and depreciation, p. 6.

Valuation, § 300 — Natural gas company — Rate base — Materials and supplies.

7. An allowance for moneys invested in materials and supplies was included in the rate base of a natural gas company so that the company could earn a return on its investment, p. 7.

Return, § 101 — Natural gas company.

8. A return of 3.84 per cent on a net investment rate base was deemed fair and reasonable for a natural gas company, p. 7.

Rates, § 2 — Legislative function — Delegation of authority to Commission.

Statement that utility rate making is essentially a legislative function which had been delegated to the Commission with a wide latitude to determine what is just and reasonable, p. 4.

Rates, § 650 — Reasonableness — Standard used.

Statement that although the Commission is not required to make any specific findings of fact, in fairness to the utilities subject to regulation and the courts called upon to review the orders, the standard used in determining the reasonableness of rates should be set forth in the opinion, p. 4.

Valuation, § 30 — Original cost — Evidence considered.

Discussion of the use of an original cost rate base as substantiated by a historical cost appraisal, p. 5.

APPEARANCES: Edwin V. Magagna, Joseph H. Galicich, Kenneth G. Hamm, Attorneys at Law, Rock Springs, appearing for applicant, Northern Utilities Company; no other appearances.

By the COMMISSION: Pursuant to notice duly given in the manner directed by the order of the Commission entered herein on April 30, 1953, this matter came on regularly for hearing before the Commission in the Council Chamber, City Hall, Rock Springs, Wyoming, on Monday, May 25, 1953, at 10 o'clock A. M., upon the application of Northern Utilities Company, hereinafter called the "applicant," filed April 30, 1953, for an order authorizing it to place in effect certain proposed increased rates and charges for natural gas service furnished to consumers at Rock Springs, Wyoming. The appearances entered of record at the hearing are set forth above. Whereupon, the company adduced oral evidence and introduced nineteen exhibits in support of its said application and the hearing was concluded.

The Commission now having duly considered said application, the testimony and exhibits of record in support thereof, the statements and representations of counsel with reference thereto, and being fully advised in the premises, hereby enters its opinion, findings, and order herein as follows:

Nature of Operations

Northern Utilities Company, appli-

cant herein, is a Wyoming corporation, having its principal office and place of business at 441 South Center street, Casper, Wyoming; that it is a public utility and as such it provides natural gas service to consumers within the municipalities of Hudson, Lander, Riverton, Glenrock, Mills, Evansville, Casper, and Rock Springs, Wyoming.

The Rock Springs system consists primarily of a 6-inch pipeline, approximately 23 miles in length, extending from the South Baxter Basin Field in Sweetwater county, Wyoming, to Rock Springs, Wyoming, and a distribution system within and near Rock Springs, Wyoming, consisting of a purification plant, mains, service lines, warehouse, and business office. These properties are physically detached and geographically separated from the other utility properties owned by Northern Utilities, and said Rock Springs properties in the main are operated as a separate and distinct entity.

Northern Utilities Company purchases its supply of gas for distribution within Rock Springs from the Mountain Fuel Supply Company, hereinafter called "Mountain Fuel." The gas purchased by Northern Utilities Company from Mountain Fuel comes from wells located within said South Baxter Basin Gas Field. This gas is a "sour" hydrocarbon and same must be chemically treated to remove the sulphur and other impurities therefrom before it is suitable for use as a commercial fuel. Northern Utilities Company accepts delivery of said gas into its said transmission line at two meter stations owned by Mountain Fuel and located in said gas field. The gas accepted by Northern Utilities Company at these points is transported in its native state via said pipeline to the purification plant owned by said company, located at its Rock Springs border station, where same is "scrubbed" before entering channels for distribution to Rock Springs consumers.

Allocation of Expenses

[1] Northern Utilities Company is also engaged in the appliance business at Rock Springs, Wyoming. The evidence shows that all direct expenses of the appliance business are charged to the appliance department and not included as expenses of the utility business. The evidence further shows that joint expenses between the utility business and appliance business are allocated upon the basis of a study made by Gordon J. Raab, an independent certified public accountant, as to the amount of time expended in each department by those employees whose services are not directly allocated, and as to the proper allocation of all other joint expenses. The portion allocated to the appliance business is deducted from the utility expense as shown by Exhibit 6.

The Rock Springs proportion of the administrative expense of Northern Utilities Company has been computed by taking an average of the meter percentage and the dollar volume percentage as provided in our order entered in Docket No. 9146 on June 12, 1950. Also, the administrative expense properly allocable to the appliance department has been deducted from the total allocated to the Rock Springs operations and is not included as utility expense.

Earnings

[2] The matter of proper earnings for the applicant was last before the Commission on application filed by the applicant on July 13, 1949 (Docket No. 9146), culminating in the Commission's order dated June 12, 1950, approving certain increases in rates to natural gas consumers at Rock Springs, Wyoming, which order was affirmed by the supreme court of Wyoming, September 2, 1952, — Wyo —, 247 P2d 767, upon appeal by the protestants in said docket.

Northern Utilities Company, by its application filed herein, requests that it be permitted to establish and place in effect increased rates and charges for natural gas service furnished to consumers at Rock Springs, Wyoming, as set forth in its proposed new rate schedule, attached to said application as Exhibit 3. According to the evidence, and as set forth in Exhibit 7, attached to said application, said proposed rates, based upon estimated gas sales during the year, 1953, will produce a gross revenue of $321,712.95; that the expenses, based on 1952 operations, but taking into consideration actually known changes, will amount to $275,889.66, resulting in an operating net profit of $45,823.29 before payment of taxes; and that after deducting income taxes in the sum of $23,838.11, the net earnings of the company will amount to $21,995.18.

The operations of the Rock Springs Distribution System and Transmission Pipeline show a net loss of $10,867.52 for the year 1952, as set forth in Exhibit 2, attached to application, and that an increase in its rates and charges for natural gas service furnished to consumers at Rock Springs, Wyoming, is necessary in order to overcome increased expenses, particularly the increase in cost of gas, from 7 to 9 cents per thousand cubic feet, and increases in wages, taxes, and materials. Unless applicant is allowed to increase its rates and charges for natural gas service to consumers at Rock Springs, Wyoming, its net operating revenue will not be sufficient to enable it to earn a fair and reasonable rate of return on its investment in properties and facilities used and useful in providing such service.

Rate Base

[3, 4] Utility rate making is essentially a legislative function. The legislature has delegated this duty to the Commission. In so doing, it has said:

"In determining what are just and reasonable rates the Commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business, and properties of the public utility whose rates are under consideration." (Section 64–121, Wyo Comp Stats 1945.)

Thus, we are given a wide latitude in the matter of determining what are just and reasonable rates for a public utility. We are not required by law to employ and follow any formula for the purpose of fixing or testing the rate structure of utilities operating under our jurisdiction. When the previous application of this applicant was before the supreme court of Wyoming (September 2, 1952), — Wyo —, 247 P2d 767, 785, Justice Riner, in

speaking of the rate-making formula, said:

"Relative to contention No. 3 made by appellants as quoted *supra,* our attention is not directed to any Wyoming statute making (requiring) such employed 'formula' to be stated by the Commission . . . ."

Neither are we required to make specific findings of fact in our opinions, as in the case cited, 247 P2d, at p. 785, the court held:

"Concerning contentions numbers 4 and 5 objecting that the Commission made no findings as desired by appellants, it may be observed that the statutes quoted above nowhere prescribe stated findings as insisted by appellants, shall be prepared by the Commission."

However, in fairness to the utilities whose rates are regulated by us and the courts who may be called upon to review our orders, we deem it desirable and expedient to set forth in our opinion, in major cases, the method or standard used in determining the reasonableness or unreasonableness of the rates therein proposed or involved. We have approved net investment cost as a rate base standard in determining what are just and reasonable rates for similar utilities (see Dockets Numbered 9143 [1950] 83 PUR NS 84 and 9142). Briefly, such a rate base is described as consisting of the average investment in plant (original cost) devoted to utility service, less average depreciation reserves, plus average investment (original cost) in materials and supplies, plus an allowance for cash working capital. We approve this type of rate base because we think it is fair to both the patrons of a utility and its investors, because it is practical and easily understood; because it is used by other regulatory bodies, not otherwise bound by statute; and finally because it has been approved by the courts. Colorado Interstate Gas Co. v. Federal Power Commission (1945) 324 US 581, 89 L ed 1206, 58 PUR NS 65, 65 S Ct 829. We therefore find that net investment cost should be used as a rate base standard in determining what are just and reasonable rates for applicant in this proceeding.

Original Cost

In our opinion in the previous hearing, we found that applicant failed to establish by competent evidence the original cost of the utility properties in service for natural gas consumers at Rock Springs, Wyoming. From the evidence in this hearing, it appears that the original part of the Rock Springs Distribution System and Transmission Pipeline was constructed by the Fremont Natural Gas Company and the Sand Draw Pipe Line Company, subsidiaries of Producers and Refiners Corporation, at an actual cost of $286,357.27, and that the cost of land was $1,388.98 making a total of $287,746.25. This was further substantiated by a historical cost appraisal, prepared by Black & Veatch, consulting engineers, Kansas City, Missouri, introduced as Exhibit No. 13, and testified in detail to by A. P. Learned of that firm. This appraisal was based on the detailed inventories of the Fremont Natural Gas Company and Sand Draw Pipe Line Company, which were attached to and by reference made a part of the original bills of sale from said companies, photostatic copies of which were presented

as Exhibits 10–A, 10–B, 11, and 12. A. P. Learned further verified the existence of said properties by an actual on-the-ground inspection. This historical cost appraisal shows an estimated total cost, exclusive of land, of $289,159, for the properties dedicated to public use by Fremont Natural Gas Company and Sand Draw Pipe Line Company, and still in use in 1953.

The evidence further discloses that in the year 1940 a study was made, as required by Federal Power Commission Order No. 73, to restate the accounts of applicant in accordance with its uniform system of accounting for natural gas utilities, and that an examiner of the Federal Power Commission, after an examination of available records and conferences with the independent certified public accountants, accepted as original cost the figures herein submitted by the applicant. Since that time, the records of the Northern Utilities Company have been kept and its account numbers and classification have been in accordance with the uniform system prescribed by the Federal Power Commission.

The applicant introduced Exhibit 9, setting forth in detail by general classification and by year the additions made during the years 1926 to 1952, inclusive. The testimony of J. M. McIntire, president of applicant, and of Gordon J. Raab, certified public accountant, verifies the amounts shown on said exhibit for said years as being the actual cost of said additions. The Commission, therefore, finds that the actual cost for the properties dedicated to public use by Fremont Natural Gas Company and Sand Draw Pipe Line Company, to be, including land, the sum of $287,746.25, and the actual cost of additions for the years 1926 to 1952, inclusive, to be, including land, the sum of $411,-845.63, or a total of $699,591.88.

Depreciation

[5] The original cost, including land, of properties dedicated to public use has heretofore been determined to be $699,591.88, and of this amount the sum of $4,482.36 is shown as land investment, leaving a depreciable investment of $695,109.52. We find that the reserve for depreciation as of December 31, 1948, was the sum of $89,032.89, and for the years 1949 to 1952, inclusive, the applicant has used a straight-line basis of 3 per cent per year, or the sum of $78,242.19, making a total reserve for depreciation as of December 31, 1952, of $167,275.08. We further find that, based on estimated gas reserves, the straight-line basis of 3 per cent per year is fair to both the applicant and its patrons for the years 1949 to 1952, inclusive, and the foreseeable future.

Working Capital

[6] In our order entered in Docket No. 9210, Re Plains Pipe Line Co. (1952) 96 PUR NS 587, 604, we said:

"A utility must provide itself with funds with which to pay its operating expenses, exclusive of taxes, interest, and depreciation expense, that become due between the time it furnishes or performs a utility service and the time it collects therefor. These funds must be supplied by the owners of the utility, and, consequently, it should be allowed to earn an income return

thereon. In utility parlance, such funds are known as 'cash working capital.'"

We find that an item of cash working capital, sufficient to cover a 45-day period, should be included in applicant's rate base; and that the amount thereof should be a sum equal to one-eighth of its annual operating expenses, not including taxes, interest, and depreciation expense. Applicant's estimated operating expenses for the year 1953, as set forth in Exhibit 7, to wit, $254,031.37, less property taxes of $3,780.69, is the sum of $250,250.68. It therefore appears that one-eighth of said sum or $31,000 is a proper amount for cash working capital.

Materials and Supplies

[7] The applicant has on hand at all times an inventory of chemicals, repair parts, materials, and supplies for use in its utility operations. Its funds are invested therein, and unless the cost thereof is included in its rate base, it does not earn a return thereon. The applicant, in Exhibit 5, sets forth the following:

Inventory and Repair Parts	$3,000.00
Chemical Inventory	2,000.00
Materials and Supplies	4,000.00

We find this to be a reasonable amount, and approve a rate base allowance in the total sum of $9,000 for these items.

Rate of Return

[8] In order to determine rate of return, it is first necessary to determine the rate base, then determine the earnings, and from the two calculate the rate of return. We have heretofore determined the rate base as follows:

Original cost of properties dedicated to public use by Fremont Natural Gas Company and Sand Draw Pipe Line Company, exclusive of land	$286,357.27
Land	1,388.98
Total	$287,746.25
Additions, years 1926 to 1952, inclusive	$408,752.25
Land acquired 1926 to 1952, inclusive	3,093.38
Total	$699,591.88
Less Reserve for Depreciation, excluding land	167,275.08
	$532,316.80
Cash Working Capital	31,000.00
Inventory, Repair Parts, Chemicals, Materials and Supplies	9,000.00
Total	$572,316.80

The gross income as set forth in Exhibit 7 amounts to $321,712.95. This amount is obtained by applying the proposed increase to the actual gas sales for 1952, and adding thereto estimated income because of anticipated 100 new customers. The expenses, based on 1952 actual expenses but taking into consideration actually known changes, will amount to $254,031.37, and, depreciation based upon 3 per cent straight-line method, will amount to $21,858.29, resulting in a net operating profit of $45,823.29 before payment of taxes; and after deducting income taxes in the sum of $23,828.11, the net earnings of the company will amount to $21,995.18, or a return of 3.84 per cent on its net investment rate base above set forth.

Considering all of the evidence in this proceeding, the Commission concludes and finds that said proposed rates and charges and the rules and regulations relating thereto are just

and reasonable; that the same should become effective as to service on and after July 20, 1953; and that an order should be entered herein accordingly.

Order

It is therefore *ordered* that the application of Northern Utilities Company for authority to increase its rates and charges for natural gas service to consumers at Rock Springs, Wyoming, be, and the same is hereby, approved; and that the applicant be, and it is hereby, authorized to file a rate schedule, containing rates and charges and rules and regulations applicable thereto, conforming to those set forth in Exhibit 3, attached to its said application;

It is *further ordered* that said rates and charges and the rules and regulations pertaining thereto, as set forth in said Exhibit 3, shall become effective as to service on and after July 20, 1953; and

It is finally *ordered* that this order shall become effective as of the date hereof.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Panhandle Eastern Pipe Line Company
v.
Federal Power Commission

Nos. 10639, 10761
204 F2d 675
April 30, 1953; rehearing denied June 9, 1953

REVIEW *of orders of Federal Power Commission requiring natural gas pipeline company to deliver substantially more gas than its system will carry; reversed. For decision in related case, see Panhandle Eastern Pipe Line Co. v. Federal Power Commission (CA3d 1953) 100 PUR NS post, p. 19, 204 F2d 925; and see also the related decision in Michigan Consol. Gas Co. v. Federal Power Commission (CA3d 1953) 99 PUR NS 263, 203 F2d 895.*

Discrimination, § 8 — Powers of Federal Power Commission — Enlargement of gas facilities.

1. The provisions of § 5(a) of the Natural Gas Act, 15 USCA § 717d(a), which confer upon the Federal Power Commission power to direct the elimination of unduly discriminatory and preferential practices, must be read in the light of and construed as subject to the proviso in § 7(a), 15 USCA § 717f (a), that the Commission may not compel the enlargement of the transportation facilities of a natural gas company, p. 13.

Statutes, § 17 — Reconciliation of sections — Natural Gas Act.

2. All sections of the Natural Gas Act, if possible, must be reconciled so as to produce a symmetrical whole, p. 13.

Service, § 6 — Powers of Federal Power Commission — Enlargement of natural gas pipeline — Discrimination.

3. An order of the Federal Power Commission requiring a natural gas pipeline company to eliminate discrimination against customers who are denied required service is beyond the power of the Commission when the order has the inescapable effect of directing the company to enlarge its system to the extent necessary to carry the amount of gas required for such customers, in view of the proviso in § 7(a) of the Natural Gas Act, 15 USCA § 717f(a), depriving the Commission of authority to compel the enlargement of facilities, p. 13.

On Rehearing

Service, § 5 — Powers of Federal Power Commission — Restoration of pipeline capacity — Natural gas.

4. The Federal Power Commission has authority to require a natural gas pipeline company to restore a lateral to the capacity for which it was originally designed and authorized, and which it at one time had, so that more gas may be delivered to a customer entitled to receive gas, p. 18.

Service, § 123 — Duty to maintain capacity — Natural gas.

5. A natural gas company which has secured authority to construct or acquire a pipeline having a definite designed capacity has an obligation to maintain the pipeline so that it will be able to continue to deliver the volume of gas for which it was originally designed and approved; and if it develops that the company can safely and feasibly deliver a larger volume of gas through the line than it was designed to carry, this obligation of maintenance includes the duty to keep the pipeline in condition to deliver the larger volume, p. 18.

Service, § 5 — Powers of Federal Power Commission — Rehabilitation of facilities — Natural Gas Act.

6. The Federal Power Commission, under § 7(a) of the Natural Gas Act, 15 USCA § 717f(a), may, if necessary or desirable in the public interest, direct a natural gas company failing to maintain its lines to improve its facilities by their rehabilitation and repair, or even reconstruction, to the extent necessary to restore them to their original designed and approved capacity or former actual capacity, as the case may be, since such action would not involve an enlargement of transportation facilities within the ban of the proviso in § 7(a), p. 18.

Service, § 27 — Functions of court and Commission — Improvement of gas facilities.

7. The question whether an improvement of the transportation facilities of a natural gas company involves the enlargement of those facilities, as distinguished from their rehabilitation and repair, is a matter to be passed upon in the first instance by the Federal Power Commission, rather than the court reviewing a Commission order requiring additional gas service, regardless of the provision in § 7(a) of the Natural Gas Act, 15 USCA § 717f (a), prohibiting the Commission from directing the enlargement of facilities, p. 18.

(McLaughlin, CJ., dissents.)

APPEARANCES: Harry S. Littman, Washington, D. C., John S. L. Yost, New York city (Scott & Littman, Washington, D. C., Baker & Daniels, Indianapolis, Ind., Steptoe & Johnson, Washington, D. C., on the brief), for petitioner; Lawrence R. Brown, Kansas City, Mo. (Paul R. Stinson, Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Mo., on the brief), for Central West Utility Company, intervenor; Robert L. Russell, Washington, D. C. (Bradford Ross, General Counsel, Bernard A. Foster, Jr., Assistant General Counsel, Francis J. Walsh, Attorney Federal Power Commission, Washington, D. C., on the brief), for Federal Power Commission.

Before Maris, McLaughlin, and Kalodner, CJJ.

MARIS, CJ.: Panhandle Eastern Pipe Line Company in the consolidated petitions for review now before us asks this court to set aside the same two orders of the Federal Power Commission which were involved in the two consolidated petitions for review filed by Michigan Consolidated Gas Company which we have just decided. Michigan Consol. Gas Co. v. Federal Power Commission (CA3d 1953) 99 PUR NS 263, 203 F2d 895. The basic facts with respect to the orders in controversy are set out at length in our opinion in those cases and need not be repeated here.

The petition filed by Panhandle to No. 10,639 seeks review of the order accompanying Opinion No. 218 of the Commission in so far as it directs Panhandle within forty-five days to take steps to increase the capacity of its lateral pipeline running from Louisburg, Kansas, to Liberty, Missouri, sufficiently to eliminate what the Commission found to be discrimination against customers on that pipeline, by making it possible to provide them with the maximum volume of natural gas to which the Commission found they were fairly entitled. The petition also sought other relief not now pertinent. The Liberty lateral had been built in 1928 and had been later acquired by Panhandle. It is a comparatively low-pressure pipeline and the maximum volume of gas which Panhandle had been able to deliver through it in a peak day was 20,925 thousand cubic feet of which 7,741 thousand cubic feet was delivered to Central West Utility Company and 10,220 thousand cubic feet to Gas Service Company, a total of 17,961 thousand cubic feet to those two companies.

Pursuant to Opinion No. 214 (see [1951] 89 PUR NS 280), Panhandle had contracted with several of its customers for gas to be delivered from the Liberty lateral but had declined to contract with Central West and Gas Service. These two customers had filed sworn statements, as authorized by Opinion No. 214, requesting maximum daily deliveries from the Liberty lateral aggregating 27,375 thousand cubic feet. These requests, if acceded to by Panhandle, would have required a maximum daily delivery from the Liberty lateral of upwards of 30,000 thousand cubic feet, approximately 50 per cent in excess of its existing capacity.

In the case of certain other lateral pipelines in the Panhandle system, Panhandle had contracted with customers for the delivery of maximum

volumes of gas in excess of the existing capacity of the particular lateral and had, with the approval of the Commission, taken steps to increase the capacity of the lateral so as to meet the obligations to its customers thus undertaken.[1] In the case of the Liberty lateral, however, Panhandle has declined to do so, taking the position that the enlargement of that lateral sufficiently to meet the demands of Central West and Gas Service would involve the unwarranted investment of a large amount of additional capital which it does not wish to devote to that purpose. In fact Panhandle had made application for leave to abandon its deliveries to Gas Service altogether and that application was pending when the orders here in controversy were made. The Commission, however, in Opinion No. 218 concluded that "Panhandle's failure and refusal to offer and afford customers served from various lateral facilities the same or similar service constitutes unlawful discrimination in service among customers, and undue preference and advantage to some customers and undue prejudice and disadvantage to others." Accordingly the Commission entered the order directing Panhandle to take appropriate steps within forty-five days to eliminate this discrimination which its first petition to review seeks to set aside.

The petition filed by Panhandle to No. 10,761 seeks to review the order issued by the Commission on March 5, 1952, in so far as it requires Panhandle to deliver to its customers a maximum daily volume of gas in excess of 850,000 thousand cubic feet, the approved capacity of its pipeline system, and to its customers on the Liberty lateral a maximum daily volume in excess of the capacity of that lateral. Pursuant to Opinion No. 214 Panhandle ultimately entered into contracts with all but four of its customers. These contracts called for the ultimate delivery of maximum daily amounts of gas aggregating 811,634 thousand cubic feet. The four customers, Michigan Consolidated Gas Company, Gas Service Company, Texas Gas Transmission Corporation, and Central West Utility Company, had filed demands for gas aggregating 275,000 thousand cubic feet per day in respect of which there had been allocated to them by Opinion No. 218 maximum daily deliveries aggregating 196,049 thousand cubic feet. The total ultimate maximum daily delivery of gas thus contracted for by Panhandle's customers plus the amounts prescribed by the Commission for the four customers with which contracts had not been made thus totaled 1,007,683 thousand cubic feet, which was 157,683 thousand cubic feet in excess of the designed and approved capacity of Panhandle's pipeline system.

In Opinion No. 218 the Commission determined that Panhandle's designed capacity would be insufficient to meet the firm requirements of its customers during the winter 1951–1952. It accordingly allocated Panhandle's system capacity among its

[1] In Opinion No. 218 the Commission found that Panhandle had discriminated against its customers on both the Liberty and the Peoria laterals. In the case of the Peoria lateral after the filing of Opinion No. 218 on August 31, 1951, Panhandle executed service agreements with its customers served from that lateral and later proposed to increase its capacity to the extent necessary to serve them. That lateral is accordingly not presently involved.

customers prescribing the minimum daily volumes which Panhandle would be required to deliver when the requirements of the customers exceeded 850,000 thousand cubic feet. In its order issued March 5, 1952, this allocation was made effective until March 31, 1952. The Commission reiterated the statement made in Opinion No. 218 that "The Commission does not expect, nor does it now intend, to issue further orders allocating the capacity of Panhandle's pipeline system during ensuing winter periods." By that order the Commission put into force as of February 20, 1952, the service agreements which Panhandle had made with its 47 customers as well as the allotments of gas made by the Commission to the four noncontracting customers. Thereby the Commission in effect directed Panhandle for the winter 1952–1953 and thereafter until further order to deliver to its customers upon demand the full maximum amounts of gas called for by the contracts and by the order with respect to the four noncontracting customers, which in the fifth year of the contracts would aggregate 1,007,683 thousand cubic feet per day.

The Commission took the view that, since Panhandle had contracted with forty-seven customers for the delivery of their requirements totaling ultimately a maximum of 811,634 thousand cubic feet per day, it would be unduly prejudicial to and unreasonably discriminatory against the four remaining customers and, therefore, in violation of the act for Panhandle to refuse them also their reasonable requirements. Accordingly the Commission directed Panhandle to continue in force the prior contracts of these four customers modified as provided by its orders for the delivery of maximum daily amounts of gas aggregating 196,049 thousand cubic feet. It is clear that in so doing the Commission has required Panhandle to deliver gas substantially in excess of the designed capacity of its pipeline system. The Commission contends that it is nonetheless Panhandle's duty under § 4(b) of the act, 15 USCA § 717c(b), to do so in order to accord to its noncontracting customers the same treatment which it has under its contracts voluntarily accorded its other customers. While the Commission does not say so its position necessarily implies a duty on the part of Panhandle to enlarge its pipeline facilities, if it is necessary to do so to carry out its duty in this regard.

It will thus be seen that both petitions for review present the same basic question, namely, whether, in the case of a natural gas company which has engaged in undue discrimination by agreeing to deliver to one group of customers a larger proportion of their reasonable requirements than it is able, because of limited pipeline facilities, to deliver to other customers similarly situated, the act empowers the Commission, for the purpose of eliminating the discrimination, to order the company to deliver to its customers substantially more gas than its pipeline system is designed to carry, thereby necessarily requiring the company involuntarily to enlarge its gas transportation facilities. In considering this question we assume, without deciding, that Panhandle was guilty of undue discrimination against its four noncontracting customers, in

violation of §§ 4(b) and 5(a)[2] of the act, in agreeing to deliver all but about 39,000 thousand cubic feet[3] per day of the capacity of its pipeline system to the other customers with which it had contracted. Also we note that under § 5(a) of the act, the Commission is empowered to eliminate such undue discrimination as this by directing, as it did in Opinion No. 218 with respect to the winter 1951–1952, that the maximum amounts of gas to be delivered to the contracting customers shall be reduced to the extent necessary to distribute the full capacity of the pipeline system fairly among all of Panhandle's customers. As we have seen, that remedy was expressly rejected by the Commission with respect to the later years here involved.

[1–3] The Commission concedes, of course, that the proviso of § 7(a)[4] of the act expressly deprives it of authority to compel the enlargement by a natural gas company of its transportation facilities in connection with the extension or improvement of such facilities. It argues, however, that this proviso relates only to the extension or improvement of natural gas transportation facilities which the Commission, acting under § 7, directs to be undertaken, and that it does not apply to an order entered by the Commission under § 5(a) directing the elimination by a natural gas company of a discriminatory practice as between existing customers which is prohibited by § 4(b).

We cannot accept the narrow construction which the Commission thus seeks to place upon the proviso of § 7(a) of the act. On the contrary we think that the provisions of § 5(a),

[2] "Section 4. . . .

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 USCA § 717c(b).

"Section 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, state Commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 USCA § 717d(a).

[3] The four noncontracting customers had requested 275,000 thousand cubic feet per day and had been allocated 196,049 thousand cubic feet per day by the Commission.

[4] "Section 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." 15 USCA § 717f(a).

which confer upon the Commission power to direct the elimination of unduly discriminatory and preferential practices, must be read in the light of and construed as subject to the proviso in § 7(a) that the Commission may not compel the enlargement of the transportation facilities of a natural gas company. As the Supreme Court said in Federal Power Commission v. Panhandle Eastern Pipe Line Co. (1949) 337 US 498, 514, 93 L ed 1499, 81 PUR NS 161, 171, 69 S Ct 1251, 1260:

"If possible all sections of the act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power."

So here we cannot hold that § 5(a) implicitly confers upon the Commission the power to direct the enlargement of natural gas transportation facilities which Congress by § 7(a) of the act expressly withheld. An order under § 5(a) directing a pipeline company to deliver more gas than its system has capacity to transport has the inescapable effect of compelling the company to improve its system by its enlargement to the extent necessary to carry the amount of gas required. For to improve is to augment or enhance in quantity as well as quality.[5] Such an order is, therefore, the equivalent of an order for the improvement of transportation facilities by their enlargement and as such is expressly within the ban of the proviso of § 7(a). Moreover, even in the absence of the proviso of § 7(a) there might well be a question whether the language of § 5(a) conferred unlimited power upon the Commission to compel a natural gas company to employ additional capital in the enlargement of its transportation facilities. Compare Interstate Commerce Commission v. United States ex rel. Los Angeles (1929) 280 US 52, 74 L ed 163, PUR1930A 376, 50 S Ct 53. In the light of § 7(a) we are compelled to conclude that Congress meant to leave the question whether to employ additional capital in the enlargement of its pipeline facilities to the unfettered judgment of the stockholders and directors of each natural gas company involved.

In Federal Power Commission v. Panhandle Eastern Pipe Line Co. *supra,* the Supreme Court held that under § 1(b) of the act the Commission has no jurisdiction over the production or gathering of natural gas. It would seem that Congress intended that the proviso of § 7(a) prohibiting the Commission from requiring the enlargement of transportation facilities for natural gas should be complementary to § 1(b). For if the Commission could require a natural gas company to enlarge its transportation facilities for the purpose of delivering more gas through them, the Commission would be effectively regulating the production and gathering of natural gas. Obviously such enlarged transportation facilities could not deliver additional gas unless it was produced and gathered.

It was stated at bar, without contradiction, that since the passage of the Natural Gas Act in 1938 the Com-

[5] Webster's New International Dictionary, 2d Ed., p. 1252.

mission has never until the present case asserted power to direct a natural gas company to enlarge its transportation facilities or to sell and deliver gas beyond the capacity of such facilities. As the Supreme Court said in Federal Power Commission v. Panhandle Eastern Pipe Line Co. *supra,* 337 US at p. 513, 81 PUR NS at p. 170, 69 S Ct at p. 1260, with respect to the attempted exercise by the Commission of power in the field of production and gathering of gas:

"Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed."

The Commission urges that its orders here under attack are supported by Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co. (CA 6th 1949) 80 PUR NS 448, 455, 173 F2d 784, 790. That case, however, did not involve the power of the Commission to compel an enlargement of transportation facilities. In that case Panhandle had already voluntarily sought and obtained authority from the Commission to install the facilities in question. Michigan Consolidated sought in an action brought in the district court to compel Panhandle to install a portion of the authorized facilities which would be of particular benefit to it ahead of other portions with which it was not so directly concerned. The Commission, intervening in the district court, contended that it had primary administrative jurisdiction to determine whether Michigan Consolidated's request for priority of installation of that part of the authorized facilities with which it was concerned would result in preference to or discrimination against one customer over another or in preference or discrimination between classes. The court of appeals upheld the dismissal of the suit by the district court on this very ground, namely, that "Consolidated has not invoked the authority of the Commission to the full extent of its regulatory powers."

We conclude that it was beyond the power of the Commission by paragraph (E) of its order issued August 31, 1951, accompanying Opinion No. 218 to order Panhandle within forty-five days to take steps to eliminate discrimination in the service between the customers on its Liberty lateral and those on its other laterals by enlarging the facilities of the Liberty lateral. Paragraph (E) of the order of August 31, 1951, must accordingly be set aside. Likewise we conclude that the Commission was without power by paragraph (E) of the order issued March 5, 1952, to permit the service agreements between Panhandle and its contracting customers calling for daily maximum deliveries of gas ultimately aggregating 811,634 thousand cubic feet to take effect and at the same time by paragraph (F) of said order to direct Panhandle to provide its four noncontracting customers with maximum daily deliveries of gas aggregating 196,049 thousand cubic feet, the total of the two being in excess of the designated capacity of the pipeline system and the total maximum deliveries directed to be made from the Liberty lateral being in excess of the existing capacity of that lateral.

Since the Commission has found that the failure of Panhandle to deliver this amount of gas to its four noncontracting customers would result in un-

due discrimination against them in favor of its contracting customers and since Panhandle did not in its brief or oral argument in this case ask us to pass upon this finding of discrimination we will set aside both paragraphs (E) and (F) of the order issued March 5, 1952, in order that the Commission may, if it finds such action appropriate, direct the elimination of any such discrimination by the reduction of the maximum amounts of gas contracted for or claimed by Panhandle's customers to such amounts as will fairly distribute the existing capacity of Panhandle's system among its customers and the existing capacity of the Liberty lateral among the customers served from that lateral.

It will be so ordered.

McLaughlin, C.J. (dissenting): I cannot agree that the orders of the Commission in these two cases should be reversed. The majority opinion reads the proviso of § 7(a) of the Natural Gas Act as a general limitation on the Commission's powers and not merely on those powers granted by § 7(a). It is stated that while § 5(a) ". . . confer[s] upon the Commission power to direct the elimination of unduly discriminatory and preferential practices . . ." the Commission may not, in asserting this power, compel the enlargement of transportation facilities, and that its orders have ". . . the inescapable effect of compelling the company to improve its system by its enlargement . . . ."

The Natural Gas Act was enacted in 1938 and, with one or two minor exceptions not here relevant, has not been amended since that date. It is admittedly in need of revision. One question arising under the act which requires clarification was posed collaterally in Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co. (CA6th 1949) 80 PUR NS 448, 173 F2d 784, and is presented here in clearer outline: the limitations on the Commission's power to correct unlawful discrimination. The sixth circuit found little, if any, precedent to aid it in determining whether the Commission's power to correct such discrimination, if asserted in such a way as to amount to an order of enlargement within § 7(a), would be beyond its jurisdiction. That court, however, in a well-reasoned opinion answered the question in the negative, thus concluding that the power under § 5(a) to correct discrimination prohibited by § 4(b) is not limited by the proviso of § 7(a).[1] With this conclusion I agree. Were the law otherwise there would in many cases be no effective means of eliminating the unreasonable differences in service and facilities which are forbidden by § 4(b).

The above considerations aside, it would seem from the location of the proviso in § 7(a) that it was meant to apply only to those situations where the Commission, finding "such action necessary or desirable in the public interest . . ." orders a natural gas company "to extend or improve its transportation facilities, to establish physical connection" with the facilities of other persons or municipal-

[1] Indeed, the court said in 80 PUR NS at p. 453, 173 F2d at p. 789:
"Whatever may be the limits placed by the act upon the authority of the Commission in other respects, it is clear that under § 717c(b) [§ 4(b)] the authority of the Commission, in respect to undue preferences or advantages, is without limitation."

ities, etc. Such orders have nothing to do with corrrecting or removing unlawful discrimination but deal with cases where *in the public interest* the Commission deems it desirable to extend or improve service. Obviously the draftsmen of the act deliberately limited the power of the Commission in that type of case where the company's behavior is not subject to a corrective order, while refusing to impose similar restrictions in cases where it is. At any rate, had Congress intended to apply the limitation to all orders of the Commission including those designed to correct discrimination, it could have included similar wording in the proviso of § 5(a), or at least have set out the restriction in a separate section or subsection so that its application to the entire act would clearly appear.

Even if it be true that the proviso of § 7(a) pervades the entire act, it is my opinion that the case should be remanded for a determination by the Commission on the question whether what Panhandle will have to do to comply with the orders of the Commission constitutes an improvement or extension on the one hand or an enlargement on the other, particularly as concerns that part of the order dealing with the Louisburg lateral. As the sixth circuit, in considering whether the Commission or the courts should decide the question, said in the Michigan Consolidated Case, *supra,* at p. 453 of 80 PUR NS, at p. 788 of 173 F2d:

"The first question we have to deal with is whether what Consolidated wants done at the Edgerton station under command of court decree, constitutes on the one hand a mere extension or improvement, concededly within the power of the Commission to direct, or an enlargement which the Commission may not order. The act nowhere defines these terms and it is somewhat baffling to determine when and under what circumstances an extension or improvement of facilities ceases to be such and becomes enlargement. Be that as it may, it is nevertheless clear to us that in the contemplation of an integrated facility extending across eight states, whether a few miles of extra pipe constitutes an enlargement or mere improvement, requires consideration of data and of facts and circumstances within the competency of the administrative authority entrusted with regulation rather than within the competency of the court. To inexpert judgment it may seem, without knowledge of such facts and circumstances, that the addition of pipe to an already existing and singly considered pipeline might well be an extension, even though such pipeline lies parallel to another and the two constitute a double pipeline. It is idle to argue that we must accept Consolidated's designation of the construction desired by it at Edgerton as an enlargement, because at the hearing below there was no controversy about it. The Commission here challenges the designation, and in any event, we are dealing with a question of jurisdiction and it is axiomatic that jurisdiction may not be conferred upon a Federal court by consent."

By contrast, in reversing, this court assumes that an enlargement has been ordered by the Commission despite the fact that there are no Commission findings as to what must be done to correct the definite existing discrim-

ination on the Louisburg lateral and, of course, no findings either that the remedy, whatever it might be, would constitute an enlargement. More than that, since under § 7(a) improvements which are enlargements cannot be ordered by the Commission, the majority, by interpreting "improve" to mean the equivalent of "enlarge", has read the former term out of § 7(a), and under its view, out of the entire act.

On Petition for Rehearing

MARIS, CJ.:

[**4–6**] The Central West Utility Company, an intervenor in this case, has filed a petition for rehearing which calls for brief discussion. Its principal contention is that the inadequacy of the Liberty lateral to deliver the volume of gas which the Commission's order would require Panhandle to deliver to Central West and other customers served from that lateral is due largely to the fact that Panhandle has allowed the lateral to fall into a condition of decay and disrepair. Central West urges that to the extent that the Commission's orders here under attack require Panhandle to restore the Liberty lateral to the capacity for which it was originally designed and authorized and which it at one time had they are within the Commission's authority. With this contention we agree.

When a natural gas company, after securing the approval of the Commission, has constructed or acquired a pipeline having a definite designed capacity it has an obligation in the public interest to maintain the pipeline in such good order and repair as to be able to continue to deliver the volume of gas for which it was originally designed and approved. And if it develops that the company can in actual operation safely and feasibly deliver a larger volume of gas through the pipeline than it was designed to carry this obligation of maintenance includes the duty to keep the pipeline in condition to deliver this larger volume of gas. If the company fails in its duty of maintenance the Commission under § 7(a) of the act, 15 US CA § 717f(a), may, if necessary or desirable in the public interest, direct the company to improve its facilities by their rehabilitation and repair, or even reconstruction, to the extent necessary to restore them to their original designed and approved capacity or former actual capacity, as the case may be. For such action would clearly not involve an enlargement of transportation facilities within the ban of the proviso in § 7(a). And the same may well be true of a direction for the use in operating a pipeline of improved facilities which will increase its carrying capacity, provided a physical enlargement of the pipeline itself is not involved.

[**7**] We adhere, however, to the view expressed in the opinion of the court heretofore filed that the Commission is prohibited by the proviso in § 7(a) from directing an improvement of the transportation facilities of a natural gas company which involves the enlargement of those transportation facilities, even though the purpose is to enable the delivery of more gas in order to eliminate undue discrimination between customers. Whether a given improvement does or does not involve a prohibited enlargement may

be a close technical question, however. We agree with the view expressed by our brethren of the sixth circuit in Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co. (1949) 80 PUR NS 448, 453, 173 F2d 784, 788, that it is a question which should be passed upon in the first instance by the Commission.

Here the Commission has not passed upon this question, since it took the view that it was empowered by § 5(a) of the act to order the enlargement of the Liberty lateral by Panhandle regardless of the ban of the proviso in § 7(a), because it thought such action to be necessary to avoid undue discrimination among Panhandle's customers. Its orders in this regard having now been set aside, the Commission will be free to reconsider, in the light of the opinions of this court, the extent to which it may lawfully require Panhandle to improve, and thereby to increase the present capacity of, the Liberty lateral.

The petition for rehearing will be denied.

McLaughlin, Circuit Judge, adheres to the views expressed in his dissenting opinion heretofore filed.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Panhandle Eastern Pipe Line Company

v.

Federal Power Commission

No. 10897
204 F2d 925
April 30, 1953

REVIEW *of orders of Federal Power Commission denying permission to reduce deliveries of natural gas; orders vacated so that Commission may reconsider application. For decision in related case, see Panhandle Eastern Pipe Line Co. v. Federal Power Commission (CA3d 1953) 100 PUR NS ante, p. 8, 204 F2d 675; and see also the related decision in Michigan Consol. Gas Co. v. Federal Power Commission (CA3d 1953) 99 PUR NS 263, 203 F2d 895.*

Appeal and review, § 57 — Grounds for vacating orders — Changed conditions — Gas service.

Orders of the Federal Power Commission denying an application by a pipeline company for permission to reduce deliveries of natural gas to a distributing company should be vacated, so that the Commission may reconsider the application in the light of existing circumstances, when the court in

another case has required the Commission to further review its allocation of gas from the existing facilities of the pipeline company.

APPEARANCES: Harry S. Littman, Washington, D. C. (Scott & Littman, Washington, D. C., John S. L. Yost, New York city, Baker & Daniels, Indianapolis, Ind., Steptoe & Johnson, Washington, D. C., on the brief), for petitioner; Charles V. Shannon, Washington, D. C. (Donald R. Richberg, Wheat, May & Shannon, Washington, D. C., on the brief), for Michigan Consolidated Gas Co., intervenor; James H. Lee, Detroit, Mich. (Paul T. Dwyer, Corporation Counsel, Detroit, Mich., on the brief), for city of Detroit, intervenor; Leonard Simons, Detroit, Mich. (Gerald K. O'Brien, Prosecuting Attorney, Wayne county, Detroit, Mich., on the brief), for county of Wayne, Mich., intervenor; Howell Purdue, Washington, D. C. (Bradford Ross, General Counsel, Bernard A. Foster, Jr., Assistant General Counsel and Louis Flax, Attorney, Federal Power Commission, Washington, D. C., on the brief), for Federal Power Commission.

Before Kalodner, Staley, and Hastie, CJJ.

PER CURIAM: On June 21, 1951, Panhandle Eastern Pipe Line Company (Panhandle) filed an application with the Federal Power Commission for permission to reduce, commencing January 1, 1952,[1] deliveries of natural gas to Michigan Consolidated Gas Company (Michigan Consolidated) at Detroit from 125,000 thousand cubic feet per day to 87,500 thousand cubic feet per day.

Following hearings in October and November, 1951, the presiding examiner, on February 28, 1952, issued his decision denying Panhandle's application. Upon exceptions taken by Panhandle, the Commission issued its Opinion No. 229 and an accompanying order on June 20, 1952, affirming with modifications the decision of the presiding examiner. On August 14, 1952, by Opinion No. 229–A, and an accompanying order, the Commission denied Panhandle's application for rehearing. Panhandle petitioned this court to review the Commission's refusal to allow its application.

It may be noted parenthetically that Panhandle's application to reduce deliveries to Michigan Consolidated was based upon a prior decision of the Commission in Re Michigan-Wisconsin Pipe Line Co. Docket No. G–669 (see [1947] 6 FPC 1, 67 PUR NS 427), a proceeding involving the issuance of a certificate of convenience and necessity to Michigan-Wisconsin Pipe Line Company, an affiliate of Michigan Consolidated, to supply natural gas to Michigan Consolidated in competition with Panhandle. Panhandle contends (1) the Commission decided in Docket G–669 that effective December 31, 1951, it would be under no obligation to deliver more than 87,500 thousand cubic feet of

[1] Michigan Consolidated purchased from Panhandle a maximum of 125,000 thousand cubic feet of natural gas per day at Detroit under a contract which expired December 31, 1951. It made additional purchases of natural gas from its affiliated pipeline, Michigan-Wisconsin Pipe Line Company.

gas per day to Michigan Consolidated at Detroit and that after that date the obligation to supply the remaining requirements of Michigan Consolidated should rest upon Michigan-Wisconsin; and (2) Michigan Consolidated and Michigan-Wisconsin had executed and filed with the Commission a service agreement obligating the latter to supply the entire natural gas requirements of the former at Detroit in excess of 87,500 thousand cubic feet per day after December 31, 1951.

According to Panhandle, the Commission's decision in Docket G–669 is res adjudicata with respect to its obligation commencing January 1, 1952, and that fact made it obligatory on the Commission to grant its petition of June 21, 1951, for permission to reduce its service to Michigan Consolidated.

Panhandle makes the further contentions that in denying its application the Commission misconstrued and misapplied the "public convenience" concept in a manner contrary to § 7 (b) of the Natural Gas Act[2] and further that the Commission based its orders on hearsay evidence in violation of § 7(c) of the Administrative Procedure Act[3] and the Due Process Clause.

The Commission urges here that Panhandle's contentions are without merit and that "the present and future public convenience and necessity preclude the abandonment" of service sought by Panhandle.

It should be noted that the city of Detroit, Michigan, the county of Wayne, Michigan, and Michigan Consolidated have intervened in support of the Commission's position.

It would serve no useful purpose to explore the respective contentions of Panhandle, the Commission, and the intervenors in view of our opinion this day in Panhandle Eastern Pipe Line Co. v. Federal Power Commission, Nos. 10,639 and 10,761 (CA3d 1953) 100 PUR NS ante, p. 8, 204 F2d pp. 675, 678, wherein we determined that the Commission in various orders affecting the geographic area involved "has required Panhandle to deliver gas substantially in excess of the designed capacity of its pipeline system"; such orders necessarily imply "a duty on the part of Panhandle to enlarge its pipeline facilities"; "the Commission may not compel the enlargement of the transportation facilities of a natural gas company" and accordingly required the Commission to further review its allocation of gas from the existing facilities of Panhandle.

Inasmuch as the orders accompanying Opinions 229 and 229–A are directly concerned by our disposition in Nos. 10,639 and 10,761, we will accordingly vacate such orders so that the Commission may reconsider the application of Panhandle to reduce delivery to Michigan Consolidated in the light of existing circumstances.

[2] 15 USCA § 717 et seq. as amended, 15 USCA § 717f.

[3] 5 USCA § 1006(c) which provides: ". . . Every party shall have the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Re Long Island Rail Road Company

Case 16287
May 26, 1953

APPLICATION *by railroad for permission to change form and period of commutation tickets; decision suspended pending outcome of related litigation.*

Rates, § 439 — Railroad — Federal and state jurisdiction.

The Commission refused to pass on the application of a railroad seeking to change the form and period of its commutation tickets, where the railroad had previously applied to the Interstate Commerce Commission for a rate increase, until the courts determined whether the Interstate Commerce Commission or the state Commission had jurisdiction over the original rate proceeding.

EDDY, Commissioner: By appropriate tariff filings the Long Island Rail Road Company seeks to change the form of its commutation tickets to be used July 1, 1953, and thereafter. This proposal illustrates a most vicious practice in utility regulation which, if not checked, affords great danger not only to the users of the Long Island Rail Road but to all customers of the utility service both in this state and throughout the nation. This is the practice of taking advantage of the uncertain line of demarcation between Federal and state jurisdiction and playing the state regulatory body against the Federal and attempting to seek the forum which the railroad management believes will best serve its purpose.

For a number of years there has been a tendency to increase Federal regulatory authority and to lessen that of the respective states. Many people have supported such a movement—some who believed that all powers should be increasingly given to a centralized Federal government, some who believed that state regulation had been too sensitive to the views of the public and some for other motives.

For many years no one questioned the legal statement that this Commission had authority to fix the fare for commuters on the Long Island Rail Road. Such fares, of course, were reviewable under certain circumstances by the Interstate Commerce Commission and in all cases by the courts. Throughout the years there have been many cases before us involving the fares of the Long Island Rail Road. In each case the question of fares for transportation solely within the state was submitted to us; and in no case has any appeal ever been taken either to the Interstate Commerce Commission or to the courts.

Recently, however, the Pennsylvania Railroad (being the owner of the stock of the Long Island Rail Road) with

the co-operation of the supposedly neutral management of the Long Island applied directly to the Interstate Commerce Commission for an increase in fares. This Commission objected to this procedure and asked dismissal of the proceeding. That request was denied by the Interstate Commerce Commission and it has instituted hearings to determine whether there should be a fare increase.

The Long Island now asks us for permission to change the form and period for which their tickets are to be used. Protestant commuters assert that such change will materially increase the revenues of the railroad. Thus, we have two revenue proceedings involving the same type of passengers: one in a state and one in a Federal forum.

The Interstate Commerce Commission asserts its right to fix the amount of fares. We are asked to pass on the form of tickets. No division of responsibility could be more absurd.

Good government requires that responsibility and power go hand in hand. No regulatory body should be asked to assert jurisdiction so shadowy or illusive that it cannot protect the public.

The proposal of divided responsibility is a concept worthy of the traditional Philadelphia lawyer and can serve no purpose except to confuse the public and bring the regulatory processes into disrepute.

If it is eventually determined by the courts that the Interstate Commerce Commission has no jurisdiction to fix commuters' fares in the first instance, then this Commission must act upon the pending application upon its merits. If, however, we are not upheld in our position and the courts hold that the Interstate Commerce Commission may, even in the first instance, fix the level of intrastate commuters' fares, then it follows that good regulation requires that that Commission likewise fix the form of the tickets which also may have a substantial effect on the revenues of the company.

The law of the case can then be cited from Holy Writ: "Hast thou appealed unto Caesar? Unto Caesar shalt thou go."

The filings should be suspended. A decision, of course, must wait until a determination by the courts as to whether the Interstate Commerce Commission or this Commission has jurisdiction in the first instance.

New England Telephone & Telegraph Company
v.
Thomas A. Kennelly, Public Utility Administrator

M. P. No. 1016
— RI —, 95 A2d 886
April 10, 1953

MOTION *to dismiss telephone company's appeal from order fixing rates and charges; denied.*

Appeal and review, § 8 — Orders appealable — Separability of order.

1. The denial of a utility's proposed tariff, with directions that a new rate schedule be filed, that such new schedule be apportioned equitably among the various classes of service, and that the decision be effective forthwith, are but four parts or subdivisions of a single order, from which an appeal may be taken, and not four separate orders, p. 25.

Appeal and review, § 8 — Revised tariff — Right of appeal.

2. An order of the Public Utility Administrator which denied and dismissed the proposed tariff of a telephone company and required the filing of a new rate schedule allowing partial rate relief was actually a fixing of rates and charges so as to permit an appeal by the aggrieved company, p. 25.

Appeal and review, § 6 — Right to appeal from part of rate order while accepting benefits from another part.

3. A telephone company may avail itself of a limited rate increase awarded it by the Commission without forfeiting the right to court review of the order denying its proposed rate increase, p. 25.

Appeal and review, § 69 — Rate increase — Matters considered by court.

4. A utility's appeal from an order denying a proposed rate increase but allowing a lesser amount should not be dismissed on the ground that the utility, if successful in its appeal, would receive both the lesser amount authorized by the order and the original proposed tariff, since the disposition of the appeal is under control of the court and the amounts already received by the utility would be taken into consideration, p. 26.

APPEARANCES: Swan, Keeney & Smith, Eugene J. Phillips and Marshall Swan, Providence, Charles Ryan, Boston, Mass., for New England Tel. & Tel. Co.; Thomas H. Gardiner, Providence, pro se.

BAKER, Justice: The instant proceeding was before this court on the motion of Thomas H. Gardiner, a person having an appealable interest therein, to dismiss an appeal by the New England Telephone and Telegraph Company from an order entered by the Public Utility Administrator fixing certain rates and charges for services furnished by such company. A conditional order was duly entered by us January 21, 1953 denying the motion. New England Teleph. & Teleg. Co. v. Kennelly (1953) — RI —, 98 PUR NS 84, 94 A2d 253. This opinion is in explanation of that order.

[1] The proponent of the motion urged that it be granted for several reasons which we will discuss briefly. The essential basis of his first contention is that the Public Utility Administrator in effect made four separate orders in passing upon the matter before him. We are unable to agree with that contention. It is our opinion that the Administrator entered only one order bearing a single number and that it contained four parts or subdivisions. That order reads as follows:

"(6726) Ordered: That the tariff filing made by New England Telephone and Telegraph Company with the Public Utility Administrator of Rhode Island on November 23, 1951, designated as Docket No. 554, be and the same is hereby denied and dismissed; and it is further

"Ordered: That said New England Telephone and Telegraph Company shall within thirty days from the date hereof file with said Public Utility Administrator of Rhode Island a revised schedule of telephone rates and charges, designed in a manner to provide said New England Telephone and Telegraph Company with additional gross revenues not to exceed $1,168,000 annually; and it is further

"Ordered: That the rates and charges contained in said tariff revision shall be apportioned equitably among the various classes of service; and it is further

"Ordered: That this order shall become effective forthwith."

[2] In support of the motion it was argued that the company was not a person aggrieved by any order of the Administrator fixing a rate, toll, or charge and hence it could not appeal to this court under the provisions of Gen. Laws 1938, Chap. 122, § 31, as amended by public laws 1949, Chap. 2174, § 31. In our judgment the argument is without merit. Giving the statute a broad and reasonable construction the order, taken as a whole, fixed rates and charges and thus in its present form permitted one aggrieved to take an appeal. The first paragraph of the order denied and dismissed the tariff filing made by the company. The result of that ruling, standing alone, was to keep in effect the existing rates and charges. See Gen. Laws 1938, Chap. 122, § 45. The second paragraph, however, ordered the company to file a new schedule of rates and charges designed to provide annually certain increased revenues. This was actually a fixing of rates or charges although not the one asked for by, or satisfactory to, the company.

[3] Pursuant to that order, the latter made such a new filing and the proponent of the motion contends in substance that by so doing and by thus

accepting partial relief it is estopped from prosecuting to this court its appeal from the Administrator's order. Taking into consideration the nature of this proceeding and the circumstances herein, it is our opinion that the company is not so estopped and that it is not foreclosed from taking and pressing its appeal by anything that the Administrator or the parties themselves have done. This question was recently passed upon in Chesapeake & P. Teleph. Co. v. Public Service Commission (1952) — Md —, 97 PUR NS 50, 93 A2d 249, and the court, after citing and reviewing the authorities, held that in a situation such as we have before us an appellant should not be put to an election but is entitled to accept the temporary relief given by the Administrator and thereafter may proceed with its appeal from his order.

[4] It is also contended in support of the motion to dismiss that if the company should be successful in its appeal it will receive not only the $1,168,000 allowed by the Administrator in his order but will receive in addition the amount of $2,150,000 which it asked for in its original tariff filing and which the Administrator refused to allow. We see no basis for such contention and in our judgment the result suggested would not follow if the company's appeal from the Administrator's order is successful. The disposition of the appeal would be under the control of this court. If we ultimately determine that on the evidence the Administrator should have approved the tariff filing as originally made by the company, which has not been withdrawn, the amount the company had already received pursuant to the Administrator's order for another filing could properly be taken into consideration.

Finally the proponent of the motion maintains that the company's first seven reasons of appeal as they appear in the eighth paragraph of its petition on appeal are not properly set out in that they do not comply with the pertinent provisions of the statute, Public Laws 1949, Chap. 2174, § 31, which require that such petition "shall fully set forth the specific reasons for which it is claimed that the order appealed from is unlawful or unreasonable." We have examined the reasons of appeal and are of the opinion that they sufficiently comply with the provisions of the statute in setting forth the specific reasons relied on by the company in questioning the validity of the order appealed from. In this connection also the proponent of the motion contends that the Administrator actually made four separate orders and that it is not clear from which one the company is taking its appeal. This is without merit since in our judgment, as already pointed out, the Administrator issued only one order which was divided into four parts.

The proponent's motion to dismiss the company's appeal is denied and the conditional order previously entered herein is affirmed.

Blue Grass Rural Electric Cooperative Corporation

v.

Berea College

Case No. 2520
May 18, 1953

COMPLAINT *against electric company's service extension into territory of co-operative; dismissed.*

Monopoly and competition, § 49 — Unauthorized extension — Invasion of territory.

1. The fact that an electric company should have applied for a certificate before starting construction of a short extension in the immediate territory of an electric co-operative was not considered to be a factor bearing on the outcome of a complaint protesting such extension, since neither party had applied for, or received, such authority and service could have been supplied by either party, p. 29.

Monopoly and competition, § 54 — Extension — Electric company and co-operative.

2. Extension of electric facilities across the facilities of a co-operative was approved where the co-operative did not have exclusive authority to serve the territory, where there would be no duplication either in the sense of parallel facilities or excessive investment in relation to efficiency or an unnecessary multiplicity of physical property, where the construction would lend itself to looping with other company lines permitting better service, and where the territory in question had been approved for annexation to the municipality served by the company, p. 29.

Monopoly and competition, § 50 — Extension — Patrons' preference — Electric company.

3. Customer preference as to electric service should be given consideration where two companies seeking to serve the same area, have approximately equivalent service, and are ready, willing and able to serve, and where the location is such that the area cannot be definitely fixed as belonging to either one or the other, p. 30.

Certificates of convenience and necessity, § 29 — When required — Extension — Complaint against invasion of territory.

Statement that ordinarily an electric extension of 850 feet does not require a certificate, but an application should be made where another utility is in the immediate territory and there is a possibility that a conflict will arise, p. 29.

By the COMMISSION: This proceeding arises out of a complaint filed by the Blue Grass Rural Electric Cooperative Corporation (hereinafter referred to as "Blue Grass") against Berea College (hereinafter referred to as "Berea"). The complaint alleges that Berea has started construction of an electric distribution line outside the city limits of the city of Berea, extending northward on the west side of highway 25.

It further alleges that the extension was begun without the necessary certificate of public convenience and necessity from the Public Service Commission; that it was not an ordinary extension of Berea's existing system; that it invaded territory previously certificated to Blue Grass for service, and that, in doing so, it will result in duplication of the existing system of Blue Grass.

The answer of Berea denied the allegations of the complaint, and the issues thus presented were heard by the Commission on February 25, March 13, and April 21, 1953.

This proceeding is similar to other disputes that have risen between privately owned utilities and rural electric co-ops over who shall serve a particular customer or a particular segment of territory.

The parties to this proceeding have placed in issue two questions:

(1) Whether the line in question here was constructed before the necessary authority was obtained from the Public Service Commission.

(2) Whether the line will duplicate existing facilities in the area.

In so far as it is pertinent here, KRS 278.020 reads as follows:

"No person shall begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except ordinary extensions of existing systems in the usual course of business, until such person has obtained from the Public Service Commission a certificate that public convenience and necessity require such construction."

The record herein discloses that the Commission has entered no order authorizing the construction of the line in controversy. It remains to determine whether it is an ordinary extension of the existing system which could be constructed without specific authorization from this Commission.

Berea has been rendering electric service in the city of Berea since 1905. During the course of the years, it has extended its lines throughout the city and beyond the city limits. The exhibits of Berea filed at the hearing on March 13, 1953, show two lines extending north and northwestward beyond the city limits of 3,900 feet and 6,600 feet respectively. These two lines are on either side of the line which is in question here. Other lines of Berea radiate from the city in a southeasterly and southwesterly direction. Indeed, the testimony shows that 43 per cent of Berea's customers are outside the city limits. The line in controversy was extended a distance of 850 feet in order to serve a Standard Oil service station then being constructed. It is also the purpose of Berea to serve a subdivision owned by the Berea Realty Company that is directly across the road from the service station. The testimony shows that this line is an extension of a line which was built in 1923 and rebuilt

in 1931. The other lines of Berea in the vicinity were built at approximately the same time.

[1] Under most circumstances an extension of 850 feet is not an extension that would ordinarily require a certificate of convenience and necessity. It is frequently necessary for electric utilities to extend their lines much longer distances than this in the everyday course of business. To require applications for certificates of convenience and necessity for extensions of this length would unduly burden and delay their operation. Here, however, where another utility is in the immediate territory and there is the possibility that a conflict will arise over the construction of the line, application should have been made to the Commission before the construction was started. However, since neither of the parties to this controversy has applied for, nor received, a certificate to serve this particular area and since service can be made available by either party, that factor should have no bearing on the ultimate outcome here.

[2] Blue Grass, however, alleges that this extension is in territory previously certificated by this Commission to Blue Grass and is a duplication of the existing system of the co-op.

The record shows that Blue Grass has a distribution line to the west of highway 25. From that line there are a number of lateral extensions, one of which extends across highway 25, in the immediate vicinity of the territory in question. Apparently these lines were constructed under the theory that they were ordinary extensions of the existing system for the record discloses that Blue Grass does not have certificates specifically authorizing the construction of these lines. Generally, the lines of Blue Grass in this area are between the lines of Berea extending north and northwestward from the city limits.

In this case, as in the case of Monticello Electric Light Co. v. South Kentucky Rural Electric Co-op. Corp. (1952) 96 PUR NS 158, the territory involved is overlapping having grown up as a result of numerous "ordinary extensions," and no definite dividing line can be made between the territory of Berea and the territory of Blue Grass. It does seem clear from the record, however, that Blue Grass does not have an exclusive certificate to serve this area.

The record is equally clear that there will be no duplication of the existing distribution lines of Blue Grass. In order to serve the Standard Oil service station and the Berea Realty Company, both Berea and Blue Grass will have to construct additional lines. The fact that Berea must cross an existing distribution line of Blue Grass does not of itself justify the allegation that this line is a duplicating one. There are other lines in the area where the converse of this situation is true and the construction here appears to be quite satisfactory from a service and safety standpoint.

In view of the fact that approximately the same amount of construction will be incurred by either party, there will be no duplication either in the sense that the proposed facilities parallel existing facilities or in the sense that the contested construction will involve an excessive investment in relation to efficiency or an unneces-

sary multiplicity of physical properties.

Indeed there was testimony that the line of Berea would be more efficient in that it would lend itself to looping with the other lines of Berea extending beyond the city limits in this area and would permit better service as far as voltage regulation and continuity of service are concerned.

Two other factors require a decision in favor of Berea. One of these is that the city of Berea is in the process of annexing the subdivision in question. The ordinance has been passed the requisite number of times, and the city has filed suit in Madison circuit court to obtain approval of the annexation. The rest of the city is already served by Berea.

[3] The second factor is that the owners and developers of the subdivision have come before the Commission and stated very definitely that their preference for service was Berea. Again, as we stated in the Monticello Case, "where both companies have approximately equivalent facilities, where both companies have the ability to serve and are ready and willing to serve, and where the location is such that it cannot be definitely fixed as belonging to either one or the other, then customer preference is certainly to be given some consideration."

In view of the foregoing, the Commission finds:

(1) The extension does not invade territory previously certificated by this Commission to Blue Grass.

(2) The extension will not duplicate any of the existing system of Blue Grass.

It is therefore *ordered:*

(1) Berea is hereby authorized to serve the area here in controversy.

(2) The complaint of Blue Grass be and hereby is dismissed.

Re Cozad Mutual Telephone Company

Application No. 19379
May 29, 1953

APPLICATION *by telephone company for authority to increase rates on certain classes of service; granted.*

Return, § 111 — Telephone company.

Proposed telephone rates that would yield a return of 5.75 per cent were considered fair and reasonable.

By the COMMISSION: This application was filed on May 1, 1953. Authority is sought to increase rates on certain classes of telephone service in and around Cozad, Nebraska.

On date of May 1, 1953, a public notice was issued setting forth the details of the case and inviting interested persons to make known their views to the Commission prior to May 29, 1953. Notice was sent to public officials, commercial clubs, and the newspapers serving the area. The case had also been advertised by the applicant in the newspapers circulated in the area. No objections have been indicated from any source. On date of May 6, 1953, the Commission received a letter from the secretary-manager of the Cozad Chamber of Commerce in which the directors of the Cozad Chamber of Commerce unanimously went on record in support of the application.

The Cozad Mutual Telephone Company is owned and operated by Mr. Mark D. Young, Cozad, Nebraska.

Applicant provides common battery type service to 888 company-owned stations and provides switching service to 405 service stations. All of applicant's telephone lines are metallic.

A table of present and proposed gross monthly rates by classes of service, station count, and showing the increase per month is as follows:

Class of Service	Present Rate	Proposed Rate	Increase
B-1	$4.75	$6.25	$1.50
R-1	2.75	3.75	1.00
R-2	2.25	3.25	1.00
Service Station	7.00 (annual)	10.00 (annual)	3.00 (per year)

The above rates are set forth on the gross basis. The rates for B-1, R-1, and R-2 are subject to a 25 cent per month discount if paid on or before the fifteenth of the current month billed. Service station rates are subject to a semiannual discount of 50 cents if paid during the first month of the semiannual period billed.

Based upon present station develop-

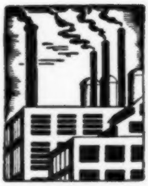
ment, the proposed rates will produce additional gross revenue of $12,153 per year.

Under the rates proposed applicant's total annual telephone operating revenue is estimated to be $51,041.95. Total annual telephone operating expense is estimated to be $40,538.17 exclusive of taxes estimated to be $3,-526.79 which will result in a net return per year of 5.75 per cent upon an adjusted net book rate base of $121,419.64.

Applicant has experienced a large demand for telephone service in and around Cozad, Nebraska, and in order to meet this increased demand it has been necessary to expend large sums of money for capital improvements since the year 1945. Applicant proposes to expend an additional $36,000 during the year 1953 for larger cable facilities and the installation of an additional position on the present switchboard. The material for this project has been purchased and the installation work was started on May 1, 1953.

Increased maintenance and traffic expenses prompted the filing of this application. It is apparent that applicant cannot continue without rate relief. It is noted that applicant has not had a general rate increase since the year 1931.

Upon consideration of the application, the files, and records, the Commission is of the opinion and finds that the application is fair and reasonable, is compatible with the public interest, is necessary, appropriate for, and consistent with the proper performance by applicant of service to the public as a wire common carrier, and should be granted.



Industrial Progress

A digest of information on new construction by privately managed utilities; similar information relating to government owned utilities; news concerning products, supplies and services offered by manufacturers; also notices of changes in personnel.

Light's Diamond Jubilee To Be Celebrated In 1954

LIGHT'S Diamond Jubilee will be celebrated throughout the country in 1954 by the electrical industry, to mark the 75th anniversary of the invention of the first practical incandescent lamp by Thomas A. Edison, it was announced recently by George H. Blake, chairman of the planning group of Light's Diamond Jubilee Committee. Plans are being started for nation-wide observances culminating on October 21, 1954, the anniversary date, Mr. Blake said.

All segments of the electrical industry, including electrical manufacturers, wholesale and retail appliance dealers, light and power companies and other groups and organizations are expected to participate in the Light's Diamond Jubilee celebration. They will co-operate in community celebrations of the Jubilee throughout the country and in several Jubilee events of national importance.

Light's Diamond Jubilee Committee is now being expanded, Mr. Blake said, and the full membership will be announced in the near future. The Committee's work to date has been done by electrical industry representatives under the direction of the planning group which included Mr. Blake who is president of Public Service Electric and Gas Company, Newark; Ralph J. Cordiner, president of General Electric Company, New York; B. L. England, past president of Edison Electric Institute; P. H. Powers, president of West Penn Power Company, Pittsburgh; Gwilym A. Price, president of Westinghouse Electric Corp., Pittsburgh; and Justin R. Whiting, president, Association of Edison Illuminating Companies.

Detailed plans for the nation-wide celebration of Light's Diamond Jubilee will be worked out during the next few months, under the coordinating direction of the Jubilee Committee. These will follow a basic general plan which has been laid out by the Committee.

Community celebrations of the Jubilee are already planned in 400 cities and towns throughout the country. First of these will probably be that in Atlantic City where the simultaneous celebration of Light's Diamond Jubilee and the Atlantic City Centennial is scheduled to begin in June.

Atlantic City Electric Plans Large Construction Program

THE Atlantic City Electric Company expects to spend approximately $13,500,000 for construction during the current year.

Next year's construction expenses are estimated at $14,000,000 and 1955 expenditures are expected to amount to at least $10,000,000.

Neptune Meter Sells Rensselaer Valve

THE Neptune Meter Company announced the sale of its subsidiary, the Rensselaer Valve Company, of Troy, New York, to an investment group headed by David Berdon and Jay Levine, 511 Fifth Ave., New York City.

John H. Ballantine, chairman of Neptune, said the sale is part of a program to concentrate its entire efforts in the water works field on the production and sale of meters and meter parts. Neptune also makes meters for measuring liquids in the petroleum, chemical, food and other industries.

Rensselaer operations in the production and sales of water works valves and hydrants will remain unchanged, according to spokesmen for the investment group which acquired the Troy firm.

During the transition period, Mr. Ballantine said, close co-operation between Rensselaer and Neptune will be continued to provide service to municipalities, private utilities and industrial plants which use Neptune meters and Rensselaer valves and hydrants.

Snyder Reassumes Management Westinghouse Transformer Div.

FRANK L. SNYDER, vice president of the Westinghouse Electric Corporation, has reassumed management of the firm's Transformer Division at Sharon, Pa., it was announced recently.

John K. Hodnette, vice president in charge of the company's industrial products divisions, made the announcement of Mr. Snyder's return to Sharon as vice president and general manager.

Mr. Snyder previously served as manager of the Transformer Division from 1949 to 1951. He succeeds Chris H. Bartlett who has been chosen by Westinghouse to attend the Harvard

(Continued on page 26)

School for Advanced Management for the next three months. After that time, Mr. Bartlett will return to Sharon as assistant division manager to direct the Division's planning program and other special management programs.

Toledo Edison Begins Work On $1,300,000 Plant

CONSTRUCTION was begun recently on a $1,300,000 electric power transmission line skirting the north edge of the city from Ironville substation, East Toledo, to a new substation being built at Jackman and Laskey Roads, according to Charles E. Ide, president of the Toledo Edison Company.

Ultimately the line will deliver power at 138,000 volts from the $29,000,000 generating station the company is building on the Maumee Bay near Harbor View, Mr. Ide said. It will operate at 69,000 volts when it is completed, probably in four months, and its capacity increased when the new plant is in operation, he said.

Contract for construction of the steel tower line has been awarded to Day and Zimmermann, Inc., Philadelphia construction engineers, and foundations for towers at the point where the line crosses the river will be built by A. Bentley & Sons Co., Toledo.

Southern California Edison Has $144,134,000 Program

SOUTHERN CALIFORNIA EDISON COMPANY is currently conducting a large expansion program.

It is estimated that during 1953 and 1954, over $144,134,000 will be spent to extend services.

Hydraulic-Magnetic Overload Relay Data Given in Bulletin

COMPLETE engineering data, model specifications and information on application of Silic-O-Netic Overload Relays is provided in Bulletin No. 5101A just released by the Heinemann Electric Company.

The new bulletin includes a complete description of the hydraulic-magnetic operating principle, and shows the principle in graphic form along with outlined data on the hermetically sealed time element. Also shown is a Time vs. Percent Load Curve giving definite response points for various size overloads. General dimensions and specifications of all models are given, and details of a typical application in protecting a three-phase air conditioning compressor motor are provided to illustrate circuity.

Copies of Bulletin 5101A are available from the Heinemann Electric Co., 339 Plum Street, Trenton 2, New Jersey.

Georgia Power to Receive First Transformer from New G-E Plant

THE GEORGIA POWER COMPANY will receive first transformer to be built and shipped at the new General Electric Company plant at Rome, Georgia.

The 5,000 kva three-phase transformer is to be shipped during the first quarter of 1954. It will be installed in the power company's Atlanta division.

Now under construction, the 25 million dollar Rome plant is scheduled to be completed in early 1954. Power transformers rated 501 to 10,000 kva will be made in the plant with a new near-conveyor-type system. Manufacturing will begin as sections of the new plant are completed.

A total of 1700 persons will be employed at the plant.

New Fine Fibered Pipe Insulation

OWENS-CORNING FIBERGLAS CORPORATION is now manufacturing a finer fibered preformed pipe insulation which includes all the advantages of the old product plus more resistance to abuse, easier handling and improved thermal efficiency, according to a recent announcement. There is no increase in price.

For use at temperatures from sub-zero to 450 degrees Fahrenheit, the new pipe insulation, like the old product which it replaces, is available with canvas coverings, or vapor seal jackets for cold lines and with a waterproof roofing felt jacket for outdoor use.

The thermal conductivity of the fine fibered insulation has been improved about 5 per cent over the excellent thermal efficiency of the old product.

According to the announcement, fine fibered pipe insulation is durable, fire-safe, non-corrosive, moisture resistant, easily fabricated, resilient, and provides no sustenance for insects, mold growth or vermin.

A-C Releases New Motor Starters Bulletin

FEATURES of Allis-Chalmers Type H starters built to control squirrel-cage, synchronous, wound rotor and multi-speed motors in ratings from 2,200 to 5,000 volts are described in a new 12-page bulletin released by the company.

The starters in ratings up to 3,000 hp at 5,000 volts are available with air or oil contactors depending upon application requirements. How these contactors are made and how they operate is explained in the bulletin.

The complete protection features of the starters—short circuit, overload, time relay undervoltage, and pullout protection—are covered in

(*Continued on page* 28)

the bulletin, which also carries schematic wiring diagrams showing typical methods of control.

Copies of "Type H Motor Starters," 14B6410B, are available upon request from Allis-Chalmers Manufacturing Company, 965 S. 70th street, Milwaukee, Wisconsin.

Catalog Covers Key Switches And Other Control Components

A COMPREHENSIVE catalog illustrating "telephone-type" components for industrial use has been issued by Automatic Electric Company.

Illustrated with photographs and diagrams, it contains specifications and general data on key switches, impulsing devices, switchboard lamps, jacks and caps, and other control devices. Specification tables are included for easy ordering. Copies will be supplied on request to the manufacturer: Automatic Electric Company, 1033 W. Van Buren street, Chicago 7, Illinois.

Complete ACSR Presentation In T&B Booklet

A COMPLETE presentation of ACSR connectors, tools, and accessories is contained in its new catalog on the subject, according to The Thomas & Betts Company, Elizabeth, New Jersey. Entitled, "T&B Method Transmission Line Connectors, Tool and Accessories," the publication was especially developed to meet the needs of transmission and distribution engineers using ACSR conductors, points out John J. Klosin, manager of the firm's utility division.

H. H. Scaff Elected Director Of Controllers Institute

HAROLD H. SCAFF, vice president, Ebasco Services, Inc., New York, was elected a director of the Controllers Institute of America recently at its 22nd Annual Meeting.

Established in 1931, the Institute is a nonprofit organization of controllers and finance officers from all lines of business — banking, manufacturing, distribution, utilities, transportation, etc. Its membership exceeds 4,100.

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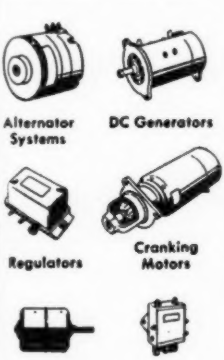

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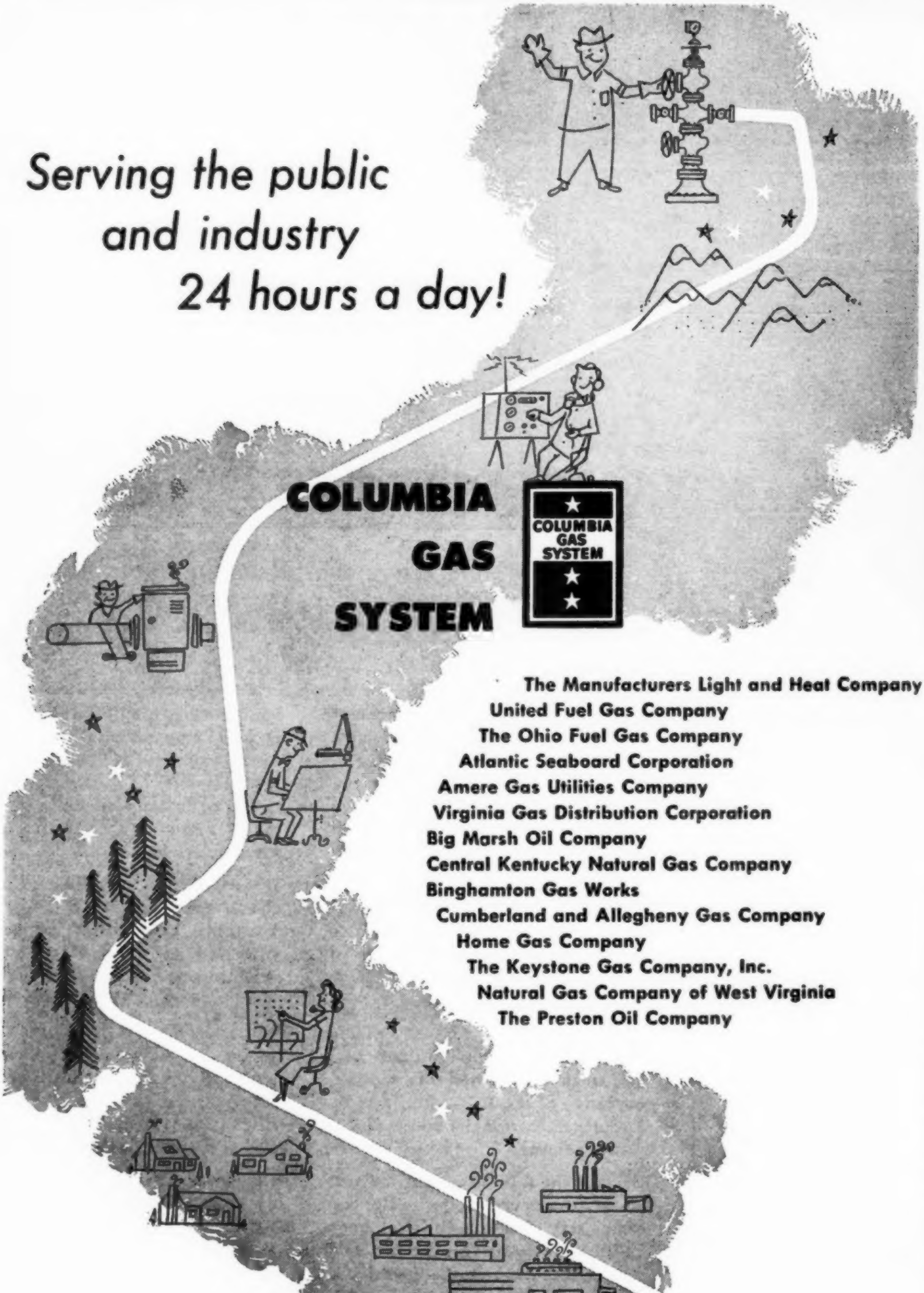
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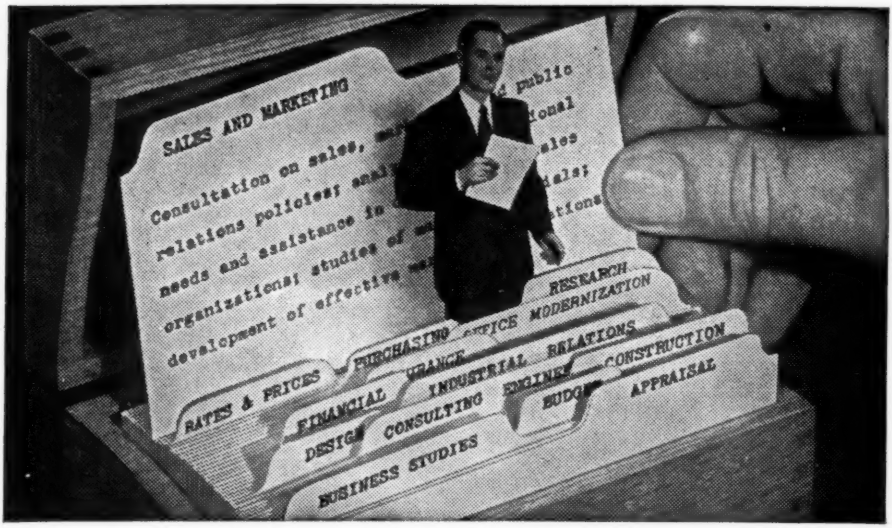

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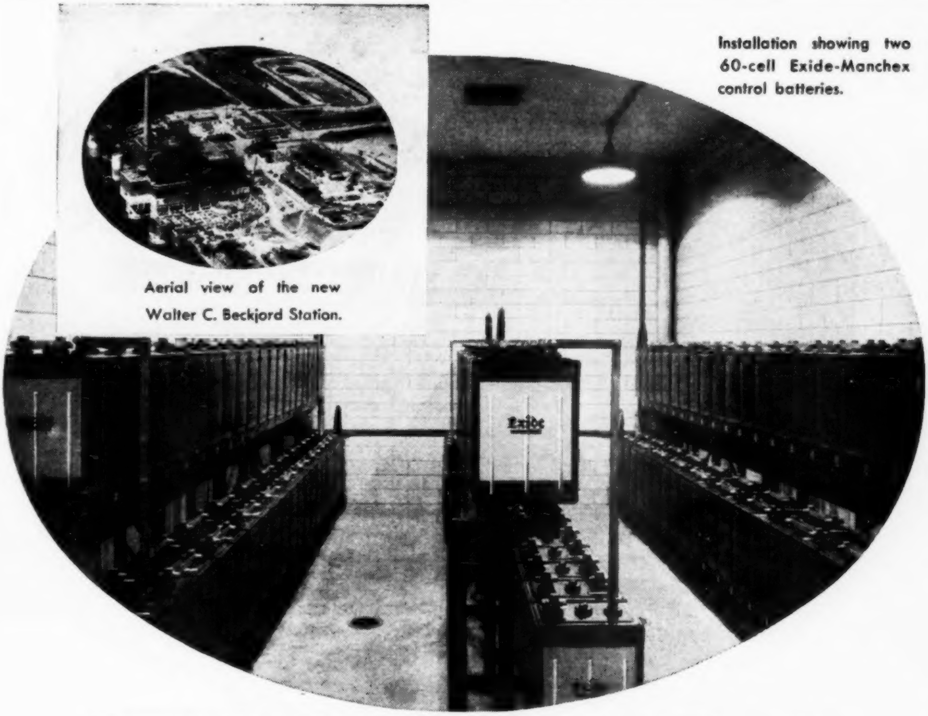

Installation showing two 60-cell Exide-Manchex control batteries.

Aerial view of the new Walter C. Beckjord Station.

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• This Directory is reserved for engineers, accountants, rate experts, consultants, and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, financing, design, and construction.

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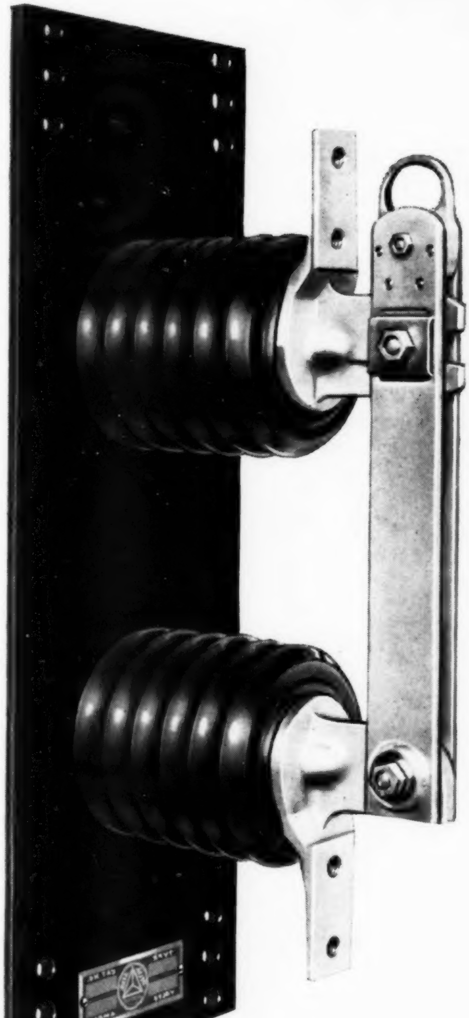


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